

104 SMALL BUSINESS PARTICIPATION IN FEDERAL
CONTRACTING: ASSESSING H.R. 1670, THE
"FEDERAL ACQUISITION REFORM ACT OF
1995"—PART II

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Small Business Participation in Fed...

HEARING
BEFORE THE
COMMITTEE ON SMALL BUSINESS
HOUSE OF REPRESENTATIVES
ONE HUNDRED FOURTH CONGRESS
FIRST SESSION

WASHINGTON, DC, AUGUST 3, 1995

Printed for the use of the Committee on Small Business

Serial No. 104-46



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SMALL BUSINESS PARTICIPATION IN FEDERAL CONTRACTING: ASSESSING H.R. 1670, THE "FEDERAL ACQUISITION REFORM ACT OF 1995"—PART II

THURSDAY, AUGUST 3, 1995.

HOUSE OF REPRESENTATIVES,
COMMITTEE ON SMALL BUSINESS,
Washington, DC.

The committee met, pursuant to notice, at 10:37 a.m., in room 2359-A, Rayburn House Office Building, the Honorable Jan Meyers, (Chair of the committee presiding.)

Chair MEYERS. Good morning. Dr. Kelman? Jere Glover, and Mr. Vander Schaaf. But Dr. Kelman is not here yet.

Mr. LAFALCE. Madam Chair, not to defend Dr. Kelman, but the witness list in my book shows a first panel with two individuals and the second panel—

Chair MEYERS. We changed it and I had hoped Dr. Kelman knew it. If he didn't, we'll hear from him when he gets here.

Today the Committee on Small Business meets to receive further testimony assessing the provisions of the proposed Federal Acquisition Reform Act of 1995, H.R. 1670, as reported by the Committee on Government Reform and Oversight on July 27.

The Members will recall this is the bill that we were very concerned about on the floor because it got us away from full and open competition and we successfully amended it on the floor.

During that hearing, grave concerns were raised about many of the bill's provisions but especially those that would abandon the standard and practice of full and open competition, the core principle of the Federal procurement process since the passage of the landmark Competition in Contracting Act of 1984.

Did we sneak up on you, Dr. Kelman?

Dr. KELMAN. We thought we were going to be in the second panel. I'm sorry, ma'am.

Chair MEYERS. Well, I'm very sorry. Who do you have with you?

Dr. KELMAN. Kevin Johnson, a contracting officer at the Internal Revenue Service.

Chair MEYERS. Yes. You called me and asked me about that. Mr. Johnson will be heard from.

During the bill's consideration by the Government Reform and Oversight Committee, H.R. 1670 has become a more formidable analytical challenge, growing from 85 pages to 150 pages. The Chairman's mark was only completed the morning of the mark-up. New

provisions have been added and many of the bill's original provisions have been substantially revised.

Unfortunately, those provisions which would most likely result in additional obstacles to small business participation, which would invite more noncompetitive contracting and which would encourage a procurement process substantially less fair and open, all have remained in the bill as reported.

I'm going to skip some of my opening statement because we have a lot of people to hear from.

The proponents of H.R. 1670 also urged that CICA's seven exceptions to competition have been retained in the reported bill, but they have converted from statutory standards to regulations. Then regulation-writers are given unlimited discretion to add to the list. I think that is one great concern.

Today we have invited a broad array of witnesses to help us understand the likely impact of H.R. 1670 on the procurement system generally and on small government contractors in particular. It is an exceptional group of experts.

We are pleased to have Dr. Steven Kelman, the Administrator for Federal Procurement Policy. He has long been an ardent proponent of greatly expanding the discretion granted contracting officers, a stance that has often put him fundamentally at odds with many in the small business community.

In our dialogue with him this morning, we will be seeking to learn whether the Clinton Administration has formulated a position on many of the provisions of H.R. 1670 which the small business community and others find so troubling.

I look forward to today's testimony. It will be very important, since it now appears that the sponsors of H.R. 1670 intend to seek action by the full House shortly after the Congress reconvenes on September 6. Such a fast track schedule affords little time for shaping an appropriate response, but given what appears to be at stake, August is certainly going to be a work period for the small business community, for me, and for the other members of this committee and other committees who are ready to answer small businesses' urgent call for assistance.

At this time I would like to recognize the ranking member, Mr. John LaFalce. Then we'll start with Mr. Doke.

[Chair Meyers' statement may be found in the appendix.]

Mr. LAFALCE. Thank you very much, Madam Chair, for calling this second hearing on H.R. 1670, the Federal Acquisition Reform Act of 1995.

During the Small Business Committee's June 27 hearing on this legislation, small business representatives expressed a number of concerns with the bill as it existed at that time, but most particularly relating to its replacing the full and open competition standard in Federal Government contracting with a maximum practicable competition standard.

Since our June hearing, the Government Reform and Oversight Committee, chaired by Congressman Bill Clinger, has reported out the bill. I'm very pleased that it does retreat from the "maximum practicable" language. So the bill, as it presently exists, differs from the bill that came to the House floor.

However, it still does not mark an unambiguous return to the full and open competition standard as it existed before. We know that support for full and open competition has very clearly been expressed by the small business community, its advocates, but I think it was also expressed by the House of Representatives, in comparison to the maximum practicable standard, when we offered a floor amendment to the FY 1996 Department of Defense Authorization bill and were successful in that effort.

I look forward to seeing how the concerns of the small business community with the bill and the efforts of the Administration and of Chairman Clinger to bring about a more efficient, equitable public contracting system can be reconciled, whether there are further changes that can and should be made in H.R. 1670 in order to best effect this reconciliation. I would hope that we could wind up with a result that is a win-win for all, with the concept, in practice, of efficiency and therefore cost effectiveness, and also ensuring that the small business community gets as much of the Federal procurement dollar as is reasonably possible. I thank you.

Chair MEYERS. Thank you very much, Mr. LaFalce. All other members of the committee will have the right to enter opening statements if they would like. We will now begin the hearing with Mr. Marshall Doke of McKenna & Cuneo of Dallas, Texas.

TESTIMONY OF MARSHALL J. DOKE, ESQUIRE, MCKENNA & CUNEO, DALLAS, TEXAS

Mr. DOKE. Thank you, Madam Chair and Mr. LaFalce, for the opportunity to express my views as to why I think the proposed legislation will particularly have an adverse effect on small business concerns.

Chair MEYERS. Mr. Doke, would you pull the mike a little closer and speak into it? Thank you.

Mr. DOKE. I do want to add that my written and oral statements today are my personal opinions and not necessarily those of my firm or any organization to which I belong. I've submitted a biography and a written statement for the record and I'll ask that it be included in the record. I'll merely summarize.

Mr. LAFALCE. Madam Chair, could I have that biography? In another life I worked with a Cuneo when I was in the Contracts Division of the Navy Department General Counsel's Office.

Mr. DOKE. It's the same one.

Mr. LAFALCE. The same one?

Mr. DOKE. Yes, sir.

Chair MEYERS. We're going to get it and distribute it.

Mr. LAFALCE. Thanks.

Mr. DOKE. I just want to summarize why I believe that small business concerns will be the most adversely affected by a reduction of, or a limitation on, competition required in Government contracting.

We need better competition, not less competition. We need less discretion, not more discretion, for the benefit of small business concerns.

First, it must be clearly understood that even the recent markup of H.R. 1670 is intended to limit competition. If anyone says otherwise, then merely ask why there's been any change in the cur-

rent standard that requires the maximum practical competition. By definition, anything different from that is less than the maximum practical competition.

Moreover, the proposed provisions of the verification system will authorize procurements limited to verified contractors. Small businesses will have the most difficult time meeting the verification standards.

Second, the proposed legislation would leave the decisions of how, and how much, competition will be limited to the procurement regulation writers. That, in my view, is like leaving the fox to guard the chicken house. It's well known that Government buyers would prefer not to have any competition at all, and I do not mean that necessarily critically. You and I would not want statutory requirements that we must fulfill when we buy a car or we modify our house, but we're not spending taxpayers' money.

To support my views, I want to discuss briefly this morning the implementation of the Competition in Contracting Act of 1984 and show how it has reduced competition, rather than increased it, as Congress intended in 1984. The principal reason that competition has been reduced is that the Competition in Contracting Act put competitive negotiations at the same level with sealed bidding. Today, we routinely see negotiation being used for work such as janitorial services, minor construction, lawn-mowing, and other things that traditionally have been awarded by sealed bidding, where competition is on price alone.

One word of background. All competitive procurements are conducted under either sealed bidding or competitive negotiations. Sealed bidding is the most competitive because the rules are clear and competition is on price alone. The low bidder wins.

The other method is competitive negotiations. Under this method, the Government can evaluate proposals using evaluation factors other than price, and the Government is not required to award the contract to the one with the low price. Typical evaluation factors, in addition to price, include corporate capability, corporate experience, financial capability, key personnel, management, quality control, and technical approach.

There are many, many different types of evaluation factors that are regularly used in Government contracting. There's no law today or provision in the Federal Acquisition Regulation that specifies what evaluation factors can be used, how many can be used, what standards are proper for grading individual factors, or what the relative importance of the evaluation factors can be. There is total discretion in those areas.

Government agencies have almost unlimited discretion in selecting those factors, and they will be upheld as long as anyone can justify they have some reasonable relationship to their needs.

Now, agencies can grade proposals with management and technical as 90 percent and cost is 10 percent, or vice versa. It's obvious that when these factors are rated higher than cost, then the winner could have a higher price, and particularly higher than the newer companies and small businesses, with less experience and financial resources. The Government calls that type of evaluation cost-technical tradeoffs, or "best value," procurements.

In my view, in many cases we don't have real competition at all. In fact, we have what I call faux competition or imitation competition, like faux marble, principally because the procurement officials have too much discretion.

First, the Government does not have to disclose its evaluation plan to the competitors, who will be submitting proposals to the Government. In other words, procurement officials have the discretion to adopt rules but not to disclose the rules that will be applied in evaluating proposals. Although the relative importance of these factors must be disclosed, the specific scoring method does not have to be disclosed. The failure to do that has a particularly adverse effect on small business.

By analogy to football, it's like having a tie game with one play left and not knowing how many points you will score by running the ball or passing the ball or kicking a field goal. Competitors do not know how many points the Government will award for various aspects of their proposal.

The second reason we have faux competition is the procurement officials often fail to disclose the evaluation factors and subfactors that they will consider in evaluating proposals. They have the discretion to grade you in areas they don't disclose.

Congress has required, on several occasions, that all evaluation factors and subfactors be disclosed, but decisions of the Comptroller General have emasculated that statutory requirement by holding that factors that are encompassed by or related to disclosed evaluation factors do not have to be revealed to the competitors. The logical error of those decisions is that all evaluation subfactors fit into those categories, and under this reasoning, they would never have to be disclosed.

In other words, a "subfactor" is, by definition, related to or encompassed by a primary factor; otherwise, it wouldn't be a "subfactor."

Another problem is the Government's use of subjective evaluation factors, which also makes it more difficult for small business concerns to compete. Subjective factors, by definition, give procurement officials discretion. The more discretion they have, the more ability they have to rate products or services higher or lower than others, and this results in the Government paying a higher price.

This leads to what I call the cafeteria selection method, where the Government postpones deciding what it wants until after proposals have been submitted and they can be graded subjectively. It's like you and I postpone deciding what we're going to eat when we go down the cafeteria line until we see what is being served and what looks good.

For example, subjective factors have been used, such as "creative or innovative thoughts," "visionary approaches," "academic credibility." In my written statement, I discuss evaluations of proposals on factors, some of which the Government probably couldn't even apply to itself, such as employee dress and grooming standards, employee conduct and attire, availability of conference rooms for the contractor, pop-up dispensers for paper towels, subsidized hot meals and beverages for employees, and even employees' political views.

To grade contractors on factors such as these will result in the Government paying a higher price to companies whose employees dress better, that subsidize their employees' meals, or have more conference room space. This is particularly prejudicial to small business.

A fourth cause of faux competition is the use of responsibility-type factors by the Government. This often leads to the practical exclusion of small business concerns. This gives procurement officials the discretion to exclude small business concerns if they're not as financially strong or do not have as much experience as some competitors, even if the small business concern could do the job satisfactorily, because in Government contracting, any contracting officer must find the company responsible, meaning capable of performing the contract satisfactorily, before they can legally award a contract.

But the Government, in competitive negotiations, can grade proposals by comparing those capabilities in areas such as financial capability, facilities, equipment, staffing, corporate experience.

Competitors have no way of knowing how much is enough. Is it really worth it for a small business to spend its time and money preparing proposals if it doesn't know how much financial capability will be graded? How much more will the Government pay for corporate experience of 100 years rather than 10 years? That's an actual case. Are the additional years worth that price?

The fifth obstacle is that the Government gives points for exceeding the specifications. This is total discretion. Only the procurement officials know how many more points they will give, and for what. How can competitors know what they are proposing for or against if the Government gives more points for offering more than it asks for? How much more does the Government want? At what level of quality or performance will additional points no longer be awarded?

A more serious policy issue is how they can legally justify that action? There are serious legal issues associated with that issue, including the minimum needs doctrine that goes back 100 years.

The problem is that the Comptroller General uniformly defers to the agencies for establishing their own needs and will uphold their requirements if there is any reasonable basis for them.

It's simply not fair to exclude small business concerns from the opportunity to do Government work. Medium and small businesses cannot compete if their experience, financial capability and facilities are compared to the corporate giants of the country. It is very doubtful that many small businesses will end up being verified sources under the proposed legislation.

But they should not be excluded if they can, and will, perform satisfactorily; in other words, if they're responsible.

It is particularly ironic to me that amid all the debate today over the merits of affirmative action in Government contracts or other areas, a legislative proposal is being considered that will limit the opportunity of small and disadvantaged business concerns to compete for Government contracts.

Many small and disadvantaged concerns are not looking for preferences. They just want to compete, fair and square. After billions of dollars have been spent in small business programs for Section

8(a) contracts, certificates of competency, and mandatory subcontracting, it's surprising to me we would even consider risking reducing opportunities for those companies to compete, all in the name of efficiency.

Finally, the circumstances that often prevent true competition are the absence of rules and effective standards or practical enforcement of our competitive system. Agencies are not even required to follow their own, undisclosed, evaluation plan. The evaluator's scores and recommendations are not binding on the procurement officials. They have total discretion.

How can you have real competition when even the undisclosed subjective rules are not enforced? That's ultimate discretion. Proposals to limit the bid protest system will reduce it even more.

I'll close by saying there's no better way or more efficient way to expose violations of law, fraud, sexual harassment by procurement officials, and other improprieties than our bid protest system. The competitors are the most qualified people to police the system. An army of auditors, inspector generals, or FBI investigators could not do as good a job.

The competitors know the product. They know the Government buyers. They know the system. They know the other competitors. This is knowledge that simply never could be obtained from any other source.

One concluding comment regarding limits on competition for purposes of efficiency. Under our democratic system of Government, we have always cherished the right of everyone, big or small, to compete for Government contracts. If efficiency can be used to justify limiting our traditional rights, then a powerful argument can be made to justify the thumb screw and the rack. Thank you, Madam Chair.

[Mr. Doke's statement may be found in the appendix.]

Chair MEYERS. Thank you, Mr. Doke, for a very compelling statement.

Next we will hear from Mr. Ronald Berger, Associate General Counsel, U.S. General Accounting Office. We're glad to have you with us. Mr. Berger, I gave Mr. Doke a little more time. He came from quite a distance, but I would like it if the rest of you would please try to stay within the bounds of the lights. I don't mean you have to stop in the middle of a sentence, but if you could conclude once the light turns red.

Thank you very much. Proceed.

TESTIMONY OF RONALD W. BERGER, ASSOCIATE GENERAL COUNSEL, U.S. GENERAL ACCOUNTING OFFICE

Mr. BERGER. Madam Chair, Mr. LaFalce, members of the committee, I'm pleased to be here this morning. I find it interesting that I'm sandwiched between Mr. Doke, who took a very interesting position, and some others, who I suspect will take a somewhat different position.

I think that's very appropriate because I'm not here—

Chair MEYERS. That's why we put you there, Mr. Berger.

Mr. BERGER. Exactly. I'm not here to take a position on H.R. 1670. I've been asked to be here this morning to go over with you a couple of aspects of the Federal Acquisition Streamlining Act of

1994, the law that puts us where we are today, to better help you assess the provisions of H.R. 1670.

FASA, as we call the Federal Acquisition Streamlining Act, has as its primary purpose simplifying our acquisition system. Among other things, what FASA did was lessen restrictions for procurements up to \$2,500, what we now call micropurchases, created a simplified acquisition threshold of \$100,000, at and below which procurements are exempted from a number of statutory requirements, and called for the conversion of our procurement system, in large measure, from a paper-based system to an electronic-based system that we call the Federal Acquisition Computer Network (FACNET).

We've recently testified before your committee on the preliminary results of our reviews of the implementation of key aspects of FASA. Today I simply want to focus on the competition and notice procedures that apply to the various dollar categories of purchases that are established by last year's legislation.

The chart that accompanies my testimony, enlargements of which are on either end of the hearing room, may assist you in following these different categories as I discuss them.

FASA, in effect, sets up three categories for Government buys: Micropurchases, the purchases up to and including \$100,000, the simplified acquisition threshold, and purchases over \$100,000. The extent of the competition that's required, the notice that's required, the procedures that are going to be followed all vary, depending on which category of procurements we're talking about.

For micropurchases, there are few requirements. No notice of the contracting requirement has to be given to the vendor community. Agencies are not required to obtain competitive quotations from suppliers. Purchasing can be made from large businesses, as well as small business. There is an exemption, an overall exemption, from the Buy American Act.

This micropurchase category was intended to expedite the procurement process and reduce administrative costs. Micropurchases comprise about 85 percent of the Government's procurement transactions. What this means for these transactions is that an agency buyer can walk across the street to buy an item, so long as what he's getting is a reasonable purchase price. The agency, if it chooses to, can use FACNET for these purchases, which means the agency can advertise its need for the system and make a quick and efficient purchase that way.

In the second category, those from above \$2,500 to \$100,000, the law specifies this new \$100,000 threshold and also specifies the use of "simplified acquisition procedures" for those purchases. Whether an agency can use those procedures up to the \$100,000 threshold depends on whether or not it has a so-called "interim" FACNET capability.

Interim FACNET capability basically means that the agency can provide electronically public notice of contract opportunities and solicit and receive responses to solicitations through that system.

If an agency has this interim system in place, it can then use the simplified acquisition procedures up to the threshold of \$100,000. If it does not, it can use simplified procedures, but only up to a ceiling of \$50,000.

FASA requires agencies to promote competition in this category only to the "maximum extent practicable," in contrast to the requirement for full and open competition in other Government purchases. FASA does reserve these purchases for small business competition, providing that at least two small businesses can submit competitive quotations.

The regulations identify FACNET as the preferred way of soliciting and receiving quotes in this category. When FACNET is used, the agency simply will solicit for its needs electronically and select from among the responses. If FACNET is not used, however, the precise procedures that will be used will vary, depending upon the dollar amount.

If a non-FACNET purchase does not exceed \$25,000, there may be a local posting requirement. For DOD that requirement is for contracts over \$5,000. For everybody else, it's for contracts over \$10,000. But there is no requirement to publicize the procurement through a synopsis in the Commerce Business Daily.

The regulations, consistent with FASA and consistent with the standard for pre-FASA small purchases, specify that a contracting officer need only solicit three vendors to satisfy the competition standard in this area. Since the regulations encourage the use of oral solicitations, this means that these procurements can be accomplished through as few as three telephone calls.

For purchases over \$25,000 and up to the simplified acquisition threshold of \$100,000, an agency not using FACNET would have to publish notice of the acquisition in the Commerce Business Daily. Among other things, this notice would have to identify the procedure to be used for awarding the contract and the timeframe for receiving responses and actually making the contract award.

FASA further requires that vendors be given a reasonable opportunity to respond and that any timely offer must be considered.

Finally, we have the category of procurements for over \$100,000. For that category, an agency has to seek full and open competition, which, for a non-FACNET agency generally means publication of the requirement in the Commerce Business Daily and consideration of all responses to the agency's solicitation, making full competition opportunities available to all responsible vendors.

That, very briefly, is my prepared statement. I'll be glad to answer any questions that you might have or go over this chart in more detail with you if you think the time is worth it.

[Mr. Berger's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Berger.

Mr. Vander Schaaf, I believe you have a travel schedule problem, is that not right?

Mr. VANDER SCHAAF. It's not urgent. I didn't know how long this hearing was going to be when I told the staff about it, but it's not until 2 p.m. this afternoon. I hope we'll be out of here by that time.

Chair MEYERS. Yes, I hope so, too. All right, then, that being the case, I do believe that we will go right in order.

Dr. Kelman, we'll hear from you next. The Honorable Steven Kelman is Administrator for Federal Procurement Policy, Office of Management and Budget, and he is accompanied by Kevin Johnson, Contracting Officer for the IRS. We will hear from you, Dr. Kelman.

TESTIMONY OF STEVEN KELMAN, ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY, OFFICE OF MANAGEMENT AND BUDGET

Dr. KELMAN. Thank you very much, Madam Chairman, Representative LaFalce and the other members of the committee. I appreciate the opportunity to appear today. I'd like my entire statement, if I could, to be put into the record and I will just deal with certain segments of the statement.

Chair MEYERS. Without objection.

Dr. KELMAN. Thank you.

I was asked, when I was to come before you today, to speak about the question of is the current system broken? What the Administration is seeking legislatively this year is to extend the same philosophy of streamlining and of best value to the larger procurements that FASA extended last year to smaller procurements.

So I'm going to address in my remarks the question of is the way we do competition in our larger procurements, over \$100,000, broken? My unequivocal answer to that question is yes, it is broken. What's some of the evidence for that?

Let me start off with the bottom line question: Are we getting good quality, good prices? Are we getting—the contractors whom we buy from, are they satisfying the missions of our Agency, compared to procurement systems in the private sector?

As a professor at Harvard, I did some empirical research into that question and surveyed Government users, the people who were buying information technology systems, and their counterparts in the corporate world. One of the questions I asked both groups was if you take your most recent major buys of an information technology system, how satisfied were you with the performance of your vendor?

Of the private sector respondents, 74 percent responded 8 to 10 on a 1 to 10 scale. They were very satisfied, 74 percent of the private sector respondents. Only 48 percent of the Government respondents, of the users, felt that they were satisfied with the performance of their vendor.

So the first bottom line is the system is not doing as good a job as the private sector is doing in getting the right contractors for the job. That's number one.

Number two, timeliness. The Vice President's National Performance Review found that in one of the agencies it looked at for the process to buy information technology, it was taking that Agency, on average, 49 months, over 4 years in a rapidly changing information technology market, to make a purchase of a major information technology system, compared to a lead time of 13 months in corporate America.

The National Performance Review also found that since 1980, as bureaucratic requirements of the system have been added on and on to each other, the average productivity of our contracting officials has declined dramatically.

Then finally, a recent study by the General Accounting Office reveals that in the period between 1990 and 1992 nearly 45 percent of information technology procurements above \$25 million were subjected to litigation, to bid protests, hardly the kind of atmos-

phere in which to try to develop a cooperative relationship between a Government customer and an industry supplier.

As Phillip Howard, author of the best-seller "The Death of Common Sense," put it recently in an article in the Wall Street Journal, in Government procurement, "negotiations with vendors are hopelessly distorted by the vendor's right to sue for any trumped-up unfairness in the process."

Now, the question is what's causing—the first question, is the system broken? Yes, it is broken and we're determined to repair those breaks. Why is it broken?

The problem is not seeking vigorous competition in the system. The Administration supports vigorous competition. We feel that the Competition in Contracting Act made a good contribution in reducing sole source buys.

We're all for vigorous competition and we want to work together with the committee to make sure that any procurement reforms continue to assure vigorous competition.

The problem is not the principle of competition but rather what I would call the pathological fear of discretion that we have adopted to manage this process, and it's often associated, as Mr. Doke indicated, and he shows the association, it's associated, misassociated, in my view, with the principle of competition.

There is an extreme pathological distrust in our system toward our front-line contracting and program professionals and a complete lack of faith in their ability to use common sense and good judgment to make sound business decisions in the best interest of the taxpayer.

This flawed idea was once common among corporate America in their attitude toward their own employees. They've now realized that that is an outdated attitude and that the skills and abilities of our work force are the key to our competitive advantage in the private sector and must be the key to fixing the problem we have in Government contracting.

It's a result of the fear of discretion that has led to all of the dysfunctions in the current system that I've just outlined and all the ways the system is currently broken.

Because of that fear of discretion, number one, we create endless trails of paper. We have created a source selection process based on voluminous paper proposals and an overly formalized evaluation process with endless documentation. The purpose of this paper blizzard is to prevent subjectivity from seeping into the process but, at the same time, it grinds the process virtually to a halt.

Speaker Gingrich, on a number of occasions, has referred to this problem and has criticized the way the current system has worked. He believes it's broken. Let me quote from him. "The contract for the B47," a previous generation from a long time ago of Air Force weapons, "is about 70 pages. In contrast, the paperwork for the C5A is so bulky that it would take five C5A's, our military's largest transport, to carry it." That's Speaker Gingrich.

In addition to that, we develop overdetailed specifications. Many of you have read the horror stories of Government chocolate chip cookies, Government salad dressing, and so forth. Those result from the fear of discretion. We are not trusting our contracting people to choose from among available commercial products, so we de-

velop these crazy specifications, which end up having one or two features in it, so no commercial companies can even bid on them. So we end up with Government salad dressing, Government chocolate chip cookies.

We have failed, in the past, to consider contractor past performance in any meaningful way, totally in contrast to common sense to the way any of us make business judgments. We have, because of a fear of subjectivity, of "cronyism," we fail to allow people to use past performance, leading to disastrous results that I saw in my own research.

Then we demand process perfection that, on top of this overly rigid structure, we have placed a protest system that requires, at least in the IT world, not simply that judgments be rational, but rather that they be nearly perfect, which adds onto the documentation.

Let me just say, in conclusion, I think it's fair to say that most disinterested experts believe that this system is broken and it needs fixing. Professor Ralph Nash, America's most distinguished expert on public contract law, retired professor at G.W. University, who wrote the books on public contract law that all of our students read, I'm sure would be happy to testify before this committee along the exact same lines or very similar lines to what I've testified today.

I'm, in my normal life, I'm a professor. I teach people who are going to work in public service. I've worked with Professor Frederickson at the University of Kansas at Lawrence, the chairman of the Public Administration Department there.

I came into this business—I don't have any special interest here. My job is to try to work for better management of the public sector. I'm in this job today because my research convinced me that the system is broken.

I urge members of the committee to read Phillip Howard's testimony and diagnosis yesterday at the National Security Committee hearing. Here this is the author of the best-selling book, "The Death of Common Sense," has no background in Government procurement other than watching the system. He's a commercial lawyer. He deals with the commercial sector. He looks at the Government system and says, "This bears no resemblance to competition as it's conducted in the competitive sector of the economy."

He believes the current system we have bears more resemblance to central planning in the Soviet Union than it does to competition as it's conducted in the private sector. He's become very interested in this issue. He's going to be on CNBC for a half an hour tonight. He's making it a crusade to change the system in a common sense direction.

Ma'am, in my testimony I discuss some of the steps the Administration has taken and some of our legislative proposals, but I want to emphasize we seek vigorous commercial-style competition, we support this committee in an effort to achieve vigorous commercial-style competition, but we must end the bureaucracy that is strangling our ability to serve the taxpayer. Thank you.

[Dr. Kelman's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Dr. Kelman.

Mr. Johnson?

**TESTIMONY OF KEVIN JOHNSON, CONTRACTING OFFICER,
INTERNAL REVENUE SERVICE**

Mr. JOHNSON. Good morning, Madam Chair. My name is Kevin Johnson. I'd like to tell you that I appreciate being invited here by Dr. Kelman to represent our front-line procurement professionals in the Federal sector. As Mrs. Meyers has indicated, I am presently employed with the Internal Revenue Service. I work within the Office of Contract Administration.

Basically, Dr. Kelman wants me to address a number of things relative to one, FASA, and two, the current reform bill [H.R. 1670]. In the spirit of Representative LaFalce's initial response relative to creating a win-win environment, I would like to basically talk about what drives me as a contracting officer, and what do I want to see as far as differences being made in the Federal sector as it relates to Federal procurement. That's primarily why I'm accompanying Dr. Kelman this morning.

First of all, what makes me drive as a contracting officer is the fact that within the Internal Revenue Service's procurement organization, I feel that I have been empowered to take ownership of the process, through the support of my immediate supervisor and through the support of our senior executive, Greg Rothwell.

I am given the leeway to serve as the teamleader and the contracting officer and the agent of the Government, as well as the IRS, on those procurements that have been assigned to me. I am not in a situation where some contracting officers are, where they're closely scrutinized, where supervisors are closely watching every action. I have demonstrated, through personal initiative, that I have the competency and the professionalism to manage a contract.

In that regard, I, in turn, feel that I have been empowered and I own part of the process.

Also, as a contracting officer, it's my responsibility to exercise good business acumen and common sense in my everyday management of every contract. What I mean by that is taking leadership. I am a team leader. I manage the information provided by the project managers within IRS, as well as on the industry side.

I manage the information provided by the cost price analysts. I manage the information provided by management, to a certain extent, within Government, as well as in industry, by advising them on what's going on in the day to day operations. I manage the information provided by the quality assurance specialists. In a sense, I work hand-in-hand with legal counsel, and to that end we exchange dialogue as far as making sure that we are operating in accordance with the laws that govern the Federal procurement process.

Last but probably most importantly, I manage the information provided by the contracting officer's technical representatives, and that person is responsible for the day-to-day technical direction of the contract. But as the agent of the IRS, I'm the only person that's authorized to obligate monies on behalf of that organization.

Next, I want to share with you the larger picture. What are we doing at Treasury Department? How are we making things better for our small business community, for the small disadvantaged businesses, for the women-owned businesses, for our 8(a)s?

Quite frankly, we're doing a lot. Presently, Treasury is the only Cabinet-level agency that's taken the initiative to go out into the small business community and actually invite them in to share information about what we're doing and to also have contracts available that can be awarded on the spot. We're talking upwards of \$1, \$2, or \$3 million for potential procurement opportunities for our small businesses.

It's entitled Partnerships, and this year we've just completed our second Partnerships. It's held in the first week of May, every year. The location varies. In that regard, we're letting the small business community know that the Treasury Department is genuinely interested in what products and services they have to offer.

In time, we're interested in reaching out, not just meeting minimally set-aside goals, but to actually exceed those goals and be a front-runner in the Federal procurement process.

For example, in fiscal year 1994, projected Treasury total procurement dollars were \$1.5 billion. Our initial goal for fiscal year 1994 was to award 29 percent of those dollars to small businesses. We actually awarded 42.4 percent. For 8(a) firms, the goal was 9.7 percent. We actually awarded 14.8 percent. Small disadvantaged businesses, the goal was 2 percent and we awarded 2 percent. Women-owned businesses, our goal was 4 percent and we actually awarded 4.9 percent.

Now, to take that a step further, the Internal Revenue Service, which primarily is responsible for the bulk of those dollars, of actually awarded, of those dollars, 63.6 percent to small businesses, 58 percent to 8(a)s, 55.2 percent to small disadvantaged businesses, and 44.4 percent to women.

So IRS, as a bureau within the Treasury Department, is the lead agency in this regard.

One other initiative taken by the Treasury Department, in accordance with Public Law 95-507, our Office of Small and Disadvantaged Business Utilization now reports directly to the assistant secretary, finance and management, whereas prior to passage of that law, that particular office reported to the procurement organization.

Now, what does that accomplish? That provides more visibility to exactly what we're doing to enhance and promote small business procurement opportunities. It's a fairly new concept, but with the discussions with our current SADB, Mr. T.J. Garcia, it's working out great and it's getting the visibility that we initially wanted.

Speaking of partnerships, in fiscal year 1994 then-Secretary Bentsen actually came out and made the statement that this is the first major event by a Cabinet-level agency whereby we set-aside approximately \$33 million for small businesses. Large businesses that participated in Partnerships signed the pledge that they would increase subcontracting opportunities.

Of those interviewed at Partnerships '94, George Munoz, our assistant secretary of the Treasury for management and chief financial officer, Dr. Kelman, former Secretary Bentsen, and Bob Welch, who is the director of procurement at Treasury, all expressed their extreme enthusiasm and were very pleased to see that Treasury Department is taking the initiative in this area.

Chair MEYERS. Mr. Johnson, we forgot to turn on the lights but I've been watching the clock and if you could conclude within a half a minute to a minute?

Mr. JOHNSON. Sure. Three initiatives within the Treasury Department that we're taking—first of all, IRS just recently completed, in the month of June, a 2-day seminar for 8(a) firms to come in, to take a look at our EC [electronic commerce] procurement organization and to provide whatever information they may need relative to electronic data interchange, electronic commerce, and major implementations concerning FASA. We provided them an opportunity to actually come in and see what we had to offer, and that was very productive.

The Bureau of Engraving and Printing actually sponsors a bi-monthly breakfast whereby we invite various small businesses to sit down and talk to those individuals in the procurement arena. Also, the U.S. Customs Service conducts a monthly vendor outreach program whereby small business entrepreneurs are able to come in and take a look at exactly what we're doing in that regard.

So that's my testimony this morning. I did not submit a written statement, but I will be getting that to you in a couple of days, as well as a biography.

Chair MEYERS. All right. Well, I thank you very much. When you submit a written statement, if you could discuss H.R. 1670, we would appreciate it very much.

[Mr. Johnson's statement may be found in the appendix.]

Our next witness is the Honorable Jere Glover, chief counsel for advocacy of the Small Business Administration. We're glad to have you here, Jere.

TESTIMONY OF THE HONORABLE JERE W. GLOVER, CHIEF COUNSEL FOR ADVOCACY, SMALL BUSINESS ADMINISTRATION

Mr. GLOVER. Thank you very much, Madam Chairman, members of the committee. It's certainly a pleasure to be here and discuss proposed legislation and how it affects small business.

As you know, one of the principal reasons the Office of Advocacy was created was to do just that—present Congress with testimony on various proposals. Congress recognized, in creating the office, that compared to the large corporations, large labor unions, public interest groups, and even certainly the Government itself, small business really didn't have a voice that could appear to Congress on specific issues, especially things like procurement, which are not high visibility issues within the national small business organizations.

Compared with the thousands and thousands of lobbyists and special interest groups in Washington, small business actually has fewer than 20 individuals working full-time on small business issues here in Washington.

We need to look at the situation today and recognize that seven companies together do more business than all small businesses, all minority businesses and all women businesses combined. So we have a situation where despite many guarantees and protections that have been placed in the law, small business still does not get its fair share of the Federal procurement dollar.

About a month ago I appeared before this committee to outline the views of the Office of Advocacy on the earlier version of H.R. 1670. At that time, I and a number of small business representatives expressed deep concerns about the provisions of the bill that would substitute the full and open competition standard with a maximum practicable competition standard.

Since the June 29 hearing, I've met with Chairman Clinger and members of his staff to discuss the concerns of the small business community. I was and continue to be encouraged by the receptivity and willingness of the chairman and his committee staff to consider alternative language and provisions for H.R. 1670.

The amendments which we are considering today are an improvement over the original bill, especially sections such as 301, which affirm the private sector reliance, and Section 318, which would provide for better training and education of contracting officers.

However, although improved, the amendments do not reach far enough in mitigating the serious concerns the small business community has concerning the bill. The words "maximum practicable competition" are gone, but the current standard of full and open competition is diluted. The revised bill would require the Government to obtain competition that provides open access and promotes efficiency in fulfilling the Government's procurement process.

What does that efficiency really mean? Frankly, we don't know, and until the regulations implementing those words are completed, we won't know. However, the way the bill is drafted, contracting officers would have significant latitude in determining the levels of competition sought, as well as considering what is efficient for the Government.

The single largest concern I have about the legislation is this. While efficiency for the Government regulation writer or the Government contractor is a laudable goal, it may not result in the procurement being efficient for the U.S. taxpayer, for small business, or for the public interest.

Small business often has heard from Washington, "I'm from the Government; I'm here to help you." We're asking them to go two steps further. "Hi, I'm a Government contracting officer and I'm here to help you," and "I am a Government regulation writer and I'm here to help you."

Based on past experiences, small business has some concern with the second and third. I think that's one of the things we want to talk about and think about today.

Where the Regulatory Flexibility Act applies, given the prospect of judicial review, which, of course, we do not yet have for the Regulatory Flexibility Act, we would hope that the regulation writers would take into consideration carefully the impact their proposed regulations are having on small business.

To date, we've submitted 10 comment letters on the proposed regulations to FASA [Federal Acquisition Streamlining Act of 1994] which was passed last year. By and large, one of the things we point out each time is their failure to comply with the Regulatory Flexibility Act.

Let me just give you an example of one specific FASA regulation, and that's the regulation implementing the Government-wide elec-

tronic commerce system or FACNET [Federal Acquisition Computer Network]. We're concerned about FACNET. When Congress passed FASA, FACNET was heralded as a great opportunity for any small business to tap into the computer, to find their opportunities and bid on Government contracts. The idea would be you could certainly drive down much of the costs and many of the proposals by allowing you to plug right in.

What we now find out, in looking at the regulations, that the system is going to be fairly expensive and it will be exclusionary for many small businesses. We've commented on a number of occasions. We've appeared and testified. We've submitted an eight-page written comment. When we look at the interim final regulations, which were just issued, in response to comments not only by the Office of Advocacy but also by other small business groups raising concerns about the cost of getting onto FACNET and the expense involved, their comment in the interim final rule was: "There were no substantive comments presented."

Well, concerns about the cost and the preclusion of small businesses who can't afford the cost of tying into the net—we heard from GAO, \$4,000 a year; our estimate was something in the neighborhood of in excess of \$1,000 a year, just to be able to find out what contracts are available—we think those were substantive comments and that they should not have been ignored by the regulation writers.

So we view the wide discretion that the regulation writers and Government contracting officers would be receiving under H.R. 1670 as an issue that still needs to be better addressed. Small business is, being asked to trust not only the regulation writers to make sure small business has been taken into consideration, but also trust the Government contracting officer. We have a history of not having had a good relationship.

Certainly the reported bill is better than the introduced bill, but I think we haven't had a chance to analyze the impact of all of the regulations implementing last year's FASA, and now we're taking on another one.

I think that we need to make sure the regulation writers are doing a good job in Part A before they start on Part B, or we may well find that small business, at the end of this process, is excluded, practically speaking, from Federal procurement. The result, of course, will be less competition and less competition translates into higher costs for the taxpayer. Thank you.

[Mr. Glover's statement may be found in the appendix.]

Chair MEYERS. Thank you very much, Mr. Glover.

Our final witness in this panel is Mr. Derek J. Vander Schaaf, and he's Deputy Inspector General, Department of Defense.

TESTIMONY OF DEREK J. VANDER SCHAAF, DEPUTY INSPECTOR GENERAL, DEPARTMENT OF DEFENSE

Mr. VANDER SCHAAF. Thank you for the privilege to testify before the House Small Business Committee. In my 14 years in this job, I've testified before a lot of committees on a lot of subjects but I've never had an opportunity to appear here.

We, as an office, have been very active in the acquisition reform process and have commented in great detail on all seven major

pieces of legislation that are currently pending before Congress involving acquisition reform.

What we obviously are trying to do is make sure this system works as efficiently as possible, but we want to also make sure that we're getting fair and reasonable prices, and so forth.

Frankly, I'm not one of those who believes the process, our acquisition program or process, is hopelessly broken, but I do believe that reform can and should result in significant changes to Government acquisition process.

However, I think there are also some underlying principles of Government procurement that must and will remain. For example, the Government will always want to buy goods and services at the quality and the performance levels that are specified in the contract and, of course, at fair and reasonable prices. I think that the Government has to offer an opportunity for all, and I mean all qualified suppliers, to compete.

Our audits of the acquisition system, operating under rules much more stringent than those that are proposed in much of this legislation, indicate that DOD procurements present enormous financial risk, because of sheer number of suppliers, diversity of products, and the large financial sums that are at stake.

Having said that, let me say a few words about competition requirements. Our studies show that competition can reduce prices anywhere from 5 to 90 percent. Typically, when we go out and audit something, we see when pre- and post-competition, when you've got true, effective competition, you normally see a 15 percent to a 30 percent reduction in prices, and we can put examples in your record to that effect and show it in great detail.

I am very concerned about changing this process from full and open competition, put into law in 1984 under the Competition in Contracting Act, with something called maximum practical or something else called open access competition. I don't know what those terms really mean, and it's going to take a long time for the courts to sort those out.

Then, added to this, we have this business about prequalified or verified vendors. I just don't agree with limiting access to Government markets because it can deny firms who are high technology firms and other companies access. The proposal, to me, seems to be a step backward from trying to entice additional companies to enter the Government market.

Contracting officers have lots of flexibility to exercise sound business judgments under the current statutes in determining the appropriate acquisition strategy for procurement.

Finally, I have to add I haven't seen any analysis or any demonstration of any kind of documentation that supports moving away from full and open competition or eliminating the existing seven exemptions to competition. The words "not feasible" or "not appropriate" have also been added to H.R. 1670 as reasons for not doing competition.

Well, I look at the words "not feasible" and "not appropriate," and I kind of see these as terms that could easily be used for plain old laziness. I don't have the time to do this; I'm too busy; well, it won't make any difference if I do it anyway; let's call it "not fea-

sible" or "not appropriate." I am very concerned about changing that language.

I do, however, favor going to some sort of a process, either a two-step process or taking advantage, which I believe existing statute already allows us to do, of going into those, determining who is in the competitive range early on in the process and eliminating the proposals that have little or no chance of success.

I also believe it's very important that we continue to publish post-award announcements so that the small business community can understand what has been actually awarded out there and they can look to prime contractors for subcontract work. Some of this legislation would also propose getting rid of the requirement that the Government put out post-award notices.

With respect to contract solicitation, present law requires that specifications in contract permit full and open competition and include restrictive provisions only to the extent necessary to satisfy the needs of the Agency.

Now, H.R. 1670 again deletes that language. I don't know for sure what the real effect in the real world of that will be, Madam Chair, but it could be serious. I guess that's why you're holding these hearings.

The Competition in Contracting Act requires that a solicitation identify all factors by which an agency reasonably expects to evaluate proposals and their relative importance. We believe that the solicitation must clearly state what factors and subfactors are to be used to evaluate the competition, so all people can be treated fairly. However, we do not take that as far as to mean that the Government has to reveal its entire acquisition strategy. I think that would be going too far, but we must make sure that the competitors for any given program know fairly well how they are going to be evaluated.

I've also got some concerns about using past performance as a major criteria in determining who gets a contract. I believe past performance is important—don't get me wrong—and we have systems which, in effect, try to measure past performance in the Department of Defense, but those systems, from our review of them, are not working all that well. They don't interrelate to each other. They use different information. They've just got a lot of difficulties, as we see it.

Now, we currently use what are called qualified bidders lists, qualified manufacturers lists and qualified products lists. Qualified products lists are, of course, the most prevalent. While we have seen that system abused from time to time, I believe it is a better system than anything we have ready to put into place. We're not really ready to replace anything with something better yet.

I should also note that of the qualified parts list, when you look at the suppliers behind those parts that are on that list, 50 percent of those are small business firms, so that's important.

We are also opposed to eliminating fee limits that are currently on cost-plus fixed-fee contracts. H.R. 1670 would eliminate the 15 percent fee limit on cost-plus R&D contracts, a 10 percent limit on other cost-plus contracts, and the 6 percent fee limit on architect and engineering fees.

We have seen no basis to eliminate those fees in terms of lack of qualified competitors wanting to get Government business. There are very few people who wouldn't like to have a cost-plus Government contract, and we're concerned that this particular bill would eliminate the fee limits.

Now, I see my time has run out, so I'm going to have to close here. I want to mention a few other things that, to me, are important and this Small Business Committee ought to consider.

I think that the Certificate of Competency program that the Small Business Administration uses has outlived its usefulness. I'm sorry about that but I think the time has come where we can do that within the Defense Department, on our own, and save some money. I'll get into how we save some money in a moment.

I think that the Department of Defense should be allowed to contract directly with 8(a) firms. I believe that we can do that appropriately and we can save a lot of lead time.

What I'm talking about here is you have to consider, when you're writing this legislation, that every time you add a day to the procurement administrative lead time for our centrally procured items, the items that are procured by, I believe, the 19 inventory control points, as we call them in the department, that are centrally stocked and managed, every time you increase that procurement administrative lead time, as we refer to it, you add about \$9.8 or \$10 million to the cost of us doing business.

So every time you can take a day off of that and things like certificates of competency and some of the business with having to wait 25 days before we can go and contract with an 8(a), I think we can dispense with those sorts of things.

I have some other concerns that are expressed in my statement. I'm obviously here to answer any questions you may have with respect to those. Thank you very much.

[Mr. Vander Schaaf's statement may be found in the appendix.]

Chair MEYERS. I thank you very much and I'd like to thank all of our witnesses. I think it's been just an outstanding panel.

What I'm going to do for the questions, because we do have a number of people to hear from, is to set the clock at 2 minutes, and this is not really to shut off any of the questioners. Use it as a guideline, if I can ask the Members to use this as a guideline. We'll set it at 2 minutes, and I would like to start the questioning with Mr. LaFalce.

Mr. LAFALCE. Thank you, Madam Chair. I cannot adequately begin to ask intelligent questions within a 2-minute period.

Chair MEYERS. Then take 5.

Mr. LAFALCE. All right. First of all, let me just give you a bit of an experience that I had as incoming chairman of the Small Business Committee in 1987. There was a procurement seminar being sponsored by the Government for contracting officers, and I went over to that procurement conference.

I'd like the members of the panel to listen to me, too.

When I walked in, I wasn't the first to be there—somebody else was up there. The person who was speaking had a huge chart, and it had the hurdles that a contracting officer had to go through in order to let a contract. It was monstrous. As I listened to the

speaker, I realized that we had a monstrous Government procurement process.

I also realized that we, the Congress, were in large part the cause of that monstrous process because we, in order to make sure that every single special interest group imaginable was protected, had legislatively mandated a certain number of days for this, certain opportunity for this, certain opportunity for that, and my God, did we have a million and one different set-asides.

We had small business set-asides. We had labor surplus area set-asides. We had other types of set-asides, too. It was really monstrous. I said to myself, "God, we have got to do something about that."

The Small Business Committee had almost no jurisdiction over the Government procurement process. It was a Government Operations responsibility. It was either Chairman Jack Brooks or John Conyers at that time, or the Administration making an initiative. That presented difficulties.

But I think our Government procurement process, when you say "broke," that might mean dead. Is it dead? No. Is it crippled tremendously, in large part by the legislation that attempted to micromanage it in order to deal with every conceivable social concern? Yes, it has.

Should we reform it? Yes. Should we reform it in a way that it still attempts to preserve the integrity of our concerns? Yes. How can we do that?

Well, once somebody came to me and said, "Congressman LaFalce, do you really need a small business set-aside? When we first created the small business set-aside, small businesses weren't getting their fair share of the Government contract, but so long as small businesses are getting their fair share, is it necessary to have a set-aside, as long as your goals are being achieved?" I said, "A very good question," but politically, it was too difficult to take on, unless the Administration was going to take it on.

In a sense, we created an affirmative action program for small businesses. Now, affirmative action programs, I think, are good, so long as they're needed. But if you achieve your goals, then I think it comes time to ask, should you continue the legislated affirmative action programs, as long as your goals are being reached? Or should affirmative action end once your goals are reached?

I think we need to ask ourselves what our goals are, what interests we want to advance and protect, and we need to come up with some type of a system of evaluation, it seems to me, of whether we've far surpassed our goals, in which case are legislative strait-jackets necessary; are we advancing toward our goals in a significant way, et cetera?

Dr. Kelman, what are your comments on that?

Dr. KELMAN. That is a big bite to take on. I was mainly listening intently, hoping it would not end up with a question to me.

Mr. LAFALCE. But you're the biggest guy on the panel. That's why I tossed the biggest question to you.

Dr. KELMAN. Well, speaking specifically on small business set-asides, I agree with the view that—

Mr. LAFALCE. I wasn't calling for their elimination. I was just using that as an illustration.

Dr. KELMAN. I think that in general, the idea that we set up some goals and not try to micromanage the process but look at the results. I mean, we should be caring about small businesses getting a chance to sell to the Government. Are small businesses able to participate in Government business, or is the paperwork so great that a lot of them just stay out of the process? Are we getting good quality and good prices for what we do?

I think, as a general matter, we both, as senior executive branch officials and you, as Members of Congress, should pay more attention to results and issues of results, rather than creating a monstrous bureaucratic process, allegedly to achieve those results.

Again, I think that the fact we've created that process, really, it all comes back, and all the bureaucracy—actually, I didn't have a chance to—I brought along a picture. Unfortunately, we've been so affected by recisions in the executive branch, we couldn't afford to blow it up any bigger than this, so I hope you can see it.

What this is, this is the proposal that a company gave to the Government for a commercial MRI system those machines in hospitals. A fully commercial system, an off-the-shelf product—this is the proposal that had to be put in for a commercial product. We have landed in that kind of situation for the reason that we have such a pathological fear of the ability of the Kevin Johnson's of this world to make good judgments on behalf of the taxpayer that we've imposed this ridiculous system. It puts an industry of professional proposal writers in business.

Small businesses don't have an easy time producing this kind of documentation and proposals.

Chair MEYERS. Would the gentleman yield? When was that picture taken?

Dr. KELMAN. This is 1988. I have a similar one from 1992, but this is 1988, 4 years after the Competition in Contracting Act was passed.

I think that view, the pathological distrust, is fueled by, I must say, by the kinds of horror stories that Mr. Doke gave in his statement. I was looking at the strange evaluation factors. I was reading his written statement. He referred to using pop-up dispensers as an evaluation factor, or using the political views of employees as an evaluation factor.

I read that and I said, "My God, what are our contracting people doing?" So I went and checked the footnotes in his testimony. They both refer to two GAO cases. I'd like to submit these for the record.

Pop-up dispensers, one of the examples in his testimony. This was a case of a procurement of paper towels for Government laboratories, for medical research laboratories, and the scientists had said that if you had to reach into the dispenser each time that you wanted to take out a paper towel, it contaminated the other towels with your material. The GAO upheld the Government's ability to use a pop-up dispenser. Not a horror story at all. Perfectly reasonable.

The political views of Government employees. Mr. Doke said that was an evaluation factor.

Mrs. MALONEY. Dr. Kelman, would you yield for one question on that last example?

Dr. KELMAN. Yes, I'd be happy to, ma'am.

Mrs. MALONEY. I agree with you completely and I applaud your work on the Federal Acquisition Streamlining Act (FASA) that passed. But the examples that you're using now on simplified procedures and commercial items all fall clearly below the \$25,000 threshold and the \$100,000 threshold.

So all of these examples have been taken care of. Under \$100,000, for commercial items, now it's the law that they can be bought off the shelf.

This particular bill doesn't address that. This particular bill, the ones that we're questioning—in fact, it removes all thresholds—the possibility of a threshold at \$100,000 or \$500,000.

So I agree with your salad dressing. In fact, I gave a speech on the floor about it and congratulated the Vice President. These examples have already been taken care of in FASA and don't address the bill that we're talking about now.

Dr. KELMAN. Congresswoman Maloney, that's a fair question. I'd again show you this picture. This is above \$100,000. This is what the provisions in H.R. 1670, which would allow us to use simplified procedures for buying commercial products, would allow us to address. This blizzard of paperwork for a standard, off-the-shelf commercial product; this is completely inappropriate, completely unnecessary. It discourages bidders from bidding, and this is a procurement above \$100,000.

Mrs. MALONEY. What is it that they bought?

Dr. KELMAN. MRI machines.

Mrs. MALONEY. An MRI machine?

Dr. KELMAN. Magnetic resonance imaging machines, machines that are used in hospitals for diagnosing people. It's an off-the-shelf commercial piece of technology, and this is what the bidders had to submit in a proposal for that commercial product.

Something like this would never occur in the commercial marketplace.

Chair MEYERS. I wonder if the gentleman would yield. Mr. Glover seems to have a comment he would like to make to this, and maybe Mr. Doke also.

Mr. GLOVER. A small irony. I happen to own a number of MRI clinics around the country. I imported some MRIs from Europe. In 1988, I had one sitting in a warehouse and I looked at that proposal.

The Government didn't just ask for an MRI. They asked for very detailed specifications of exactly which MRI. We talked with the scientists and the doctors involved. They wanted one that was not only state-of-the-art; they wanted one even better than state-of-the-art. They got real picky about what they wanted.

I happened to be in that business and I happened to look at some Government contracts at that time. They didn't want just MRIs; they wanted scientists to read them; they wanted somebody to provide the facilities.

That's a pretty rough example, because at that time I did have for sale an MRI sitting in a warehouse that was manufactured by Technicare, I sure would have loved to have sold it to the Government. But it wasn't just "Sell me an MRI." It was very detailed and the scientists got involved and got real picky about exactly what they wanted.

Chair MEYERS. So this was the scientists that were setting standards?

Mr. GLOVER. The contracting officer chose not to say, "Give me one that meets general specs," but went very detailed. I didn't look at every one of them because there was this pattern of this one; looking for something bigger, better, fancier. Instead of saying, "The FDA says this is approved, sell me an FDA-approved MRI." They said, "Sell me one that meets these new specs."

Dr. KELMAN. Sir, Jere, I agree with you, that's the problem, that because we haven't been willing to say simply to vendors, "Submit to me your MRI; let us evaluate it and we'll see what makes the most sense." We've required, in advance, all these specifications to be established, that then you have to spend this kind of paperwork presenting a proposal to show that you've met all these specifications. That is exactly the problem.

Indeed, what the Administration has asked for in this legislation is the ability, and it would be allowed for under the simplified commercial procedures provisions in H.R. 1670, of the Government simply to say to vendors, "Send me in your stuff and let us take a look at it and we'll then figure out, after we've taken a look at what's in the marketplace, what kinds of products best meet the Government's needs."

Mrs. MALONEY. Would you yield on that example?

Chair MEYERS. Ms. Maloney and then I think Mr. Doke would like to comment.

Mrs. MALONEY. Well, going back to the example of the MRI, the problem there was specifically the contracting officer, in whom you now want to give all of the power with no guidelines.

If the contracting officer had said, "Give me a State of the art MRI; I'm going to competitively bid it, closed bid, just standard state of the art," it could have been handled in 20 days. But the contracting officer, because someone in Government said, "Oh, by the way, we don't want standard state of the art; we want the scientists involved and we want X, Y, or Z and we want this, that and the other, it's got to be this machine," that's why it then became complicated specs.

So that, I don't think, is a good example. Under the proposed law before us, we would have the same problem because the contracting officer would have total power. They could come in and say, "You know, we want one that can only process blue material." I don't know, just using some example, some silly spec.

You see what I'm saying? The problem there was the contracting officer, who then drew complicated specs. He could simply have said, "Give me state of the art."

Dr. KELMAN. Ma'am, I guess my view would be the problem in the system was not the contracting officer. The problem was that the contracting officer had to protect herself or himself against the situation where you would have gotten in some claimed MRI machine that had no acceptance in the commercial marketplace, that came in as a purported low bid, and that we would have had to accept that.

So to avoid that, we've developed these complicated specs because we don't trust the contracting officer simply to say, "Look, you sent in this machine. This isn't going to meet anybody's needs.

The past performance is terrible. You've never succeeded in selling this to any commercial customer. You've built this in your garage for the Government. This isn't going to meet the——

Mrs. MALONEY. But the law says the lowest qualified bidder. So if it is built in the garage and isn't sold on the commercial market and doesn't fit anybody's needs, if I were a contracting officer, I'd throw it out the first day.

Chair MEYERS. I think we have two people who would like to comment, Dr. Kelman. Mr. Doke first and then Mr. Vander Schaaf.

Mr. DOKE. First of all, I'll buy Dr. Kelman a steak dinner if the Government has ever bought any MRI machine on a low bid. They always do it on the basis of quality and other evaluation factors.

Second, you have to distinguish the issues of what the Government buys from how it buys it. Right now, the Government has complete authority, complete discretion to use whatever specifications it wants to specify an MRI machine. That's the user people. That's not the system of competition or excluding suppliers.

It can be done right now, and we've got to separate those issues because every time somebody wants to throw out the system and throw the baby out with the bathwater, they want to come up with a horror story.

It's the Government specification writers that say that we've got to submit proposals in 15 copies and that we have to have written responses to each specification item. That doesn't have to be done today. All they have to do is cut it back.

I've got to comment, as personal privilege, to the footnote in my article on the pop-up dispenser. That's my point. If the Government wanted that, why didn't the doctor say, in the specifications, they wanted one they didn't have to touch, rather than secretly grading it on the——

Dr. KELMAN. That's not true. Read the case. It was in the specification that the Government required a pop-up dispenser. The case is right here.

Chair MEYERS. Mr. Vander Schaaf.

Mr. VANDER SCHAAF. I'd just like to add that the problem here appears to be in the specification and not in the procurement process at all. I'm not sure it's a very good example in that sense because the Government obviously—and that's often a problem in our business, in the Defense Department—we don't buy the commercial item. We buy the commercial item plus something else, plus something else, and then you write the spec and you've got trouble.

I have difficulty with the legislation that's before you. Under it, if we're going to buy a new MRI that's never been sold before, because there isn't one like it on the market, the Government would no longer have any right to understand how the pricing was derived. We would not get any cost or pricing data in this procurement.

But getting back to Mr. LaFalce's first question, there are some things I think Congress can do to help make it simpler when we buy commercial products. There are a lot of laws, you made reference to some, and even questioned some that this Small Business Committee is responsible for, that shouldn't apply to simplified acquisitions, under \$100,000, but that still apply. They're just, to me,

incompatible with commercial practice. We don't use them out there.

Mr. LAFALCE. Such as?

Mr. VANDER SCHAAF. Such as Buy America Act, the Berry Amendment, foreign content. We've got things under domestic source restrictions such as ball bearings and roller bearings, all sorts of things that when you're buying under \$100,000, you've got to put a provision in the contract.

We've got ethics requirements, the Byrd Amendment, prohibition on certain persons doing business with Government, Walsh-Healey, Service Contract Act, all of these laws should not apply below \$100,000, if you're really going to go to simplified commercial acquisitions.

Mr. LAFALCE. Madam Chair, if it's not in the witness's testimony—you weren't reading from your testimony, were you?

Mr. VANDER SCHAAF. No, but some of this is in my testimony.

Mr. LAFALCE. Well, could you give us a separate list of all those items you were suggesting for our consideration that apply to contracts, at least under \$100,000?

Mr. VANDER SCHAAF. These laws, for the large part, all have special constituencies, and that's fine. Maybe there's a national policy and interest when we're really dealing with big items, but 99 percent of our purchases are under \$100,000, 99 percent. We can go to commercial practices. We're looking at things like using commercial bank credit cards to get rid of a lot of the finance and accounting workload.

This is something Congress can deal with, rather than trying to determine the specifications on an MRI machine. To me, that's the kind of thing that you have got to look at.

Chair MEYERS. Have we exhausted this question? One more question, Mr. LaFalce?

Mr. LAFALCE. Well, Mr. Vander Schaaf is going to submit to the committee a list of all those laws that stifle the contracting officer, and yet all of them had some societal goal. Would you articulate a second list, for each law you want repealed, what an appropriate goal might be.

Mr. VANDER SCHAAF. I understand.

Mr. LAFALCE. So that we can achieve that goal without the legislative micromanagement and straitjacket.

Mr. VANDER SCHAAF. I'm not saying these laws are entirely bad and they ought to be repealed, but they ought not be applied to those acquisitions that we're trying to get into the commercial world. They're incompatible with commercial practice, and that's the point I'm trying to make.

[The list of suggested exemptions may be found in the appendix.]

Chair MEYERS. Thank you very much. Mr. LaTourette.

Mr. LATOURETTE. Thank you, Madam Chair. I have a couple of H.R. 1670 specific questions. I'd just like the take of the panel on this.

One of the criticisms that was leveled against H.R. 1670 during the mark-up in Government Reform and Oversight was the lack of some hearings and input on a couple of the provisions that I'd like to ask about. If anyone has an opinion, just jump in.

One is the provision in last year's FASA that permits State and local governments to buy off the Federal Supply Schedules. I imagine when this legislation arrives at the floor, there will be an amendment in some form that will delay State and local governments having the ability to do that.

One, I'd ask anyone who has an opinion on that to offer that opinion. Second, since we're under the 2-minute rule, I'll ask my second question so you can answer both questions.

As you know, H.R. 1670, in its current form, also deals with recoupment and, I believe, revokes the recoupment provisions for purchases. I'd like to know the take of the panel on that, as well.

Chair MEYERS. Who would like to respond to that?

Dr. KELMAN. The Administration has views on both those issues. I'd be happy to give them to you, Congressman LaTourette.

On the cooperative purchasing, what FASA did last year was to open up the opportunity—not a requirement, the opportunity—to State and local governments, homeless shelters, nonprofit hospitals and so forth, if they so chose, to buy off of the contracts that the Federal Government, GSA or the VA or whatever, has with companies on the Federal Supply Schedules.

Presumably, they would only chose to do that if the State and local governments were getting better prices. It was not a requirement. It was just an opportunity to save the taxpayers at State and local governments money.

Unfortunately, even before this provision in FASA has been able to be implemented, a special interest campaign has surfaced to repeal that provision which is designed to save State and local taxpayers money.

The Administration strongly urges Members of this committee, in your own interest and support of the taxpayers of State and local governments, to oppose this special interest amendment if it should hit the floor. If this amendment passes, taxpayers in State and localities will lose.

On recoupment, this is not directly a procurement issue, but the Administration's position on recoupment is that we support the Clinger-Spence mark-up and have supported the repeal of the statutory recoupment requirements as a way to improve the export competitiveness of the defense industry. It's not directly a procurement issue, but the Administration has supported Chairman Clinger and Chairman Spence on this.

Mr. LATOURETTE. Thank you. Is there anyone on the panel with a different take on the first question, State and local purchasing off the Federal supply schedule? Anyone have a different view? I appreciate it. Mr. Doke?

Mr. DOKE. I'm not aware of any issue that has been raised, at least in our area, so I have no opinion one way or the other on that.

I would support the view strongly about eliminating the recoupment. I think that has posed a handicap to American businesses overseas, and I think it would be a great advantage to eliminate it.

Mr. LATOURETTE. I think the criticism, if I understand the case, not being expert or studying it extensively, on the State and local purchasing off the Federal Supply Schedules, is it's a parochial issue. The Federal Supply Schedules may have vendors nationwide

but, for instance, in Cleveland, Ohio, if you didn't make that particular list, it would exclude a Federal agency within Cleveland, Ohio—it wouldn't exclude them because it's optional; I understand that, but the feeling was it would somehow damage the parochial interests. If none of you have a view in that regard, then you've answered my question.

Dr. KELMAN. If the local supplier is competitive, they will continue to get the business.

Mr. LATOURETTE. I appreciate it very much. Thank you, Madam Chair.

Mr. VANDER SCHAAF. I probably ought to make a comment about the second provision, dealing with the international competitiveness and the idea that we would no longer charge the research and development cost. We've waived it in many, many cases already, but I have to point out to the committee, between 1995 and the year 2000, the United States Government would collect about \$1 billion from these R&D charges on foreign sales that were made and help us recover some of the U.S. taxpayers' investment in the original R&D for those military products that we sell overseas.

We have basically opposed this. We find that the United States Government's military suppliers have no problem competing in foreign markets. In fact, they dominate most of the foreign military markets. Since the taxpayers do, in fact, put their money up to do the R&D, to make the original equipment, we've historically done this, ever since the Arms Export Control Act of 1968 or thereabouts.

I would be concerned about just eliminating that \$1 billion of receipts to the U.S. Treasury.

Mr. LATOURETTE. You have information that disputes the claims of those engaged in the sales, that they're losing business to France, Italy and Germany because of—

Mr. VANDER SCHAAF. Yes. Our work would show that if you look at where suppliers are going to buy military equipment, we're the leading edge. When buyers want to purchase military equipment, they come to the United States to purchase it.

We may lose an occasional sale here and there, but we're very competitive in world markets in military equipment.

[Supplemental material subsequently submitted by Mr. Vander Schaff may be found in the appendix.]

Mr. LATOURETTE. Thank you, Madam Chair.

Chair MEYERS. Thank you, Mr. LaTourette.

Let me ask a question, and I'll direct it to Mr. Doke and Mr. Glover, maybe Mr. Glover first.

Dr. Kelman says that the current competition requirements are broken, the current system is broken. Mr. Glover, you have experience in both the private sector and public sector contracting. Are there legitimate differences between commercial buying practices and public contracting procedures?

Mr. GLOVER. I think so, clearly. The motivation factor when I'm in the private sector was always based on long-term price. Simply, I knew that assuming I could get the quality that I wanted, if I got the lowest price, I was always very happy. People who were working for me, who were doing purchasing, they knew that was the motivation. In the private sector, there's only one motivation:

How can I make a profit? If I pay less for supplies and equipment that I need, then that's my only motivation, making a profit, the bottom line.

On the other hand, for Government, price is only a factor to be considered but by no means the primary factor. Often the person wanting the particular good or service wants it very quickly. They want it from somebody that they're very comfortable with and who is very reliable, someone they've been doing business with over time. They don't like to change.

So if they can find a way that price isn't the determining factor, they're often happy about that. If you look at the situation we're in right now, where seven companies, who have developed an expertise at providing goods and services to the Government, doing more business than all small businesses combined, obviously the system isn't perfect. I was glad to hear the numbers because I'd heard a range of from 5 to 90 percent. I was glad to hear the 25 to 33 percent range—that's why, in the private sector, we compete everything. We may not do it every solicitation, but we do it periodically.

Chair MEYERS. Thank you. Mr. Doke?

Mr. DOKE. I think we have to realize that doing business with the Government is a different business than the commercial world. It's not just different in degree. It's different in kind. You cannot make Government business commercial business, no matter how hard you try.

One of the parties is the sovereign, and that involves sovereign immunity. It has official immunity of its employees. You can't sue them if they lie, cheat or steal, because of official immunity. You've got a changes clause that permits the Government unilaterally to change and defer paying you, for years, an equitable adjustment on the contract.

You've got a disputes provision that says the contracting officer makes the decision. That's one party to the contract deciding disputes—unheard of in the commercial world.

You've got a provision in Government contracts that says that if the contracting officer decides that black is white, you've got to continue performance. You can't stop work and have your own remedy because you've got to do whatever the contracting officer says; otherwise, you're in breach of contract, even if you're right in your viewpoint.

You have termination for convenience. If the Government cancels the contract, they don't have to pay you anticipated profits, like you do in the commercial world, because the contract says they don't.

All the socioeconomic provisions you mention, they are not in the commercial world. So you can't compare apples with oranges and say we've got to make the two the same because it's a fundamentally different kind of business.

Chair MEYERS. Thank you, Mr. Doke.

Let me ask a question of Mr. Doke and Mr. Vander Schaaf. Maybe Mr. Johnson would like to reply to this one. Do you believe that the current statutory and regulatory system for procurement give contracting officers adequate flexibility to exercise judgment?

Mr. VANDER SCHAAF. I do, ma'am, yes. I think the current system gives them a lot of flexibility. They're sometimes afraid to use

some of the flexibility they have and we've seen contracting officers who want cost or pricing data sometimes to use it as a crutch when there's price information available they can use to establish a reasonable price. But all in all, I think they have a high degree of flexibility if they're willing to use it.

Mr. JOHNSON. The answer to your question is definitely yes. I think it's a matter, however, of personal initiative of the contracting officer. A lot of us recognize and acknowledge that we are safeguarding public funds, and we have to use business acumen and common sense in everything that we do. If you don't find that, then you just can't manage public funds successfully.

So the answer to your question, in my opinion, is yes, the flexibility is there. Personal initiative is a major factor, management support, senior executive support, and, of course, the Administrator of OFPP support. When you put all those instruments together, I think we can make the process a whole lot better.

Chair MEYERS. Mr. Doke?

Mr. DOKE. I'll just say quickly that in dealing with the people representing clients dealing with the Government, our biggest problem is the contracting officers who won't exercise the judgment they have, the discretion they have, for one reason or another. There's plenty of discretion available for them to exercise.

Limiting the number of suppliers, they can do it with the competitive range right now. The Comptroller General will support reductions in the competitive range early on, even up to one person, as long as it's justified. They'll look closely at it if it gets to one.

So I think that the issue is give them the support. Let them know that when they exercise judgment, that they're not going to be criticized by their superiors. We want them to exercise more judgment in those areas.

Dr. KELMAN. If I could just say one thing, ma'am, if there is consensus around the table that it's a good idea for contracting officers to be able to exercise discretion and good business judgment, that is all that the language in H.R. 1670 is trying to do. It just remedies the fact that right now, CICA, the Competition in Contracting Act, does a good thing. It establishes a standard that says we need competition. That's a good thing.

The lower prices that we get, that Derek Vander Schaaf referred to refer to competition versus sole source buys. The Administration is not for sole source buys. I don't think any—I assume nobody at this table is for sole source buys.

At the same time, there is nothing in the existing Competition in Contracting Act that in any way encourages the Kevin Johnson's or the others of the world. There's nothing that tells them that Congress believes that it's all right for them to use good business judgment, good common sense.

Most of the messages that our people have traditionally gotten from the system are encouraging them in the opposite direction. A lot of our people are doing their best in that discouraging environment to try to get the best deal for the taxpayer.

All we're asking is that Congress add onto what already exists in the Competition in Contracting Act a new signal that talks about the importance of efficiently and effectively meeting the tax-

payers' needs in the way we do competitions. There's nothing in the statute now that encourages that.

Chair MEYERS. Mr. Doke.

Mr. DOKE. I just want to say that, with all due respect to Mr. Johnson, I don't want him deciding who to exclude from competing for his contracts. I think he has good judgment, but I don't want him making that decision.

Chair MEYERS. Mr. LaFalce.

Mr. LAFALCE. One of the tests, it seems to me, of whether the present system works is the amount of litigation that takes place under the present system. Now, somebody had used statistics—I think it was 46 percent of all contracts or a certain kind of contracts are litigated. Could someone—was it you, Dr. Kelman?

Dr. KELMAN. Yes, it was.

Mr. LAFALCE. Could you flesh that out? If this is an inordinate amount of litigation, who's initiating it? Is it the private sector? Is it the Government? If it is an inordinate amount of litigation, what does this say about the system?

Dr. KELMAN. The figure I was referring to is a recent General Accounting Office study that showed that in 1990 to 1992, about 45 percent of information technology procurements over \$25 million, one or more of the losing vendors sued the Government about the decision.

We set up that special regime that makes it especially easy for vendors to sue their customers in the Competition in Contracting Act for information technology procurements. It took it away from the existing system in the GAO, which works well, and where litigation is kept in reasonable bounds. We increased the incentives for disappointed vendors to sue their customers in the Competition in Contracting Act. It's one of the changes the Administration has sought this year, and it's part of the punitive environment where our contracting officers—

Mr. LAFALCE. To what extent does this punitive environment exist only in the IT area or is this reflective of other areas, too?

Dr. KELMAN. It's the worst in the IT area, which is also not, in my view, coincidentally regarded as the most troubled area of Government procurement, because of the adversary relationships, the second-guessing and process perfection that the current statutory regime imposes on those procurements.

Chair MEYERS. We're going to have to move on because we have had new Members come in that I think would like to join the questioning, and I'll recognize Mr. Longley.

Mr. LONGLEY. Thank you, Madam Chairman.

Mr. Doke, I'd like to follow up on a point you were making about when you cancel a contract, you need to pay anticipated profits. Is that the way the system is set up?

Mr. DOKE. In the commercial world, you do. In the commercial world, if you enter into a contract to build a 50-story building and cancel that contract the next day, the contractor's entitled to all the profits that he would have made if he'd been permitted to build the building, over 5 years.

Not so with the Government since the Civil War. The Government has a termination for convenience clause in the contract that

says the next day it can cancel the contract but then it doesn't have to pay you any profits, except on work you've actually done.

Mr. LONGLEY. Is that the case across the board?

Mr. DOKE. Yes, sir.

Mr. LONGLEY. Let me ask a question. To what extent in the contracting process is the Government actually concerned with whether or not the vendor is going to make a profit on the product that he or she might be selling the Government?

Mr. DOKE. I'm sorry, I don't understand your question. Actually, the Government is not concerned about whether a vendor makes a profit or not if it performs the contract right, if it's a firm, fixed price contract, because that's the risk that goes with the bargain. You might take a profit or you might make a loss if it's a firm, fixed price.

On the other hand, when the Government changes the bargain by terminating it in the middle of performance or early on, then the contractor is deprived of the benefit of the profit that it would have made had the Government fulfilled its bargain and not terminated it, canceled it.

Mr. LONGLEY. Well, part of where I'm coming from is my own experience, about 10 or 15 years ago, in negotiating the sale of a small product to an agency of the Defense Department. I was struck by not only the incredibly cumbersome paperwork but frankly, the level of legal complexity involved and the inability of the people who were administering the contract to even begin to understand the system.

I was left with the very distinct impression that I was precluded from offering a price to manufacture a specific product at my risk and that setting a fixed price was very much part and parcel of the entire negotiation.

The bottom line is it took, I think, 12 or 18 months to sell, I think, 250 very small items to the agency. It was just appalling to me to see how complex it was and very definitely the extent to which the people involved weren't conversant totally with the details and they were reviewed and micromanaged by another two or three levels of bureaucracy. Very much a part of that was their concern that I make money on the project when, in fact, I was only concerned with making the sale.

Mr. DOKE. There's no obligation, in any law or regulation, for the Government negotiators to protect you or to assure that you have a profit. In fact, quite the contrary. If there's any limitation, they have to make sure that whatever profit is negotiated with you, or estimated profit, is reasonable, and they have to make that determination. It can't be beyond that.

Mr. LONGLEY. Are there contracts that are entered into wherein there's a form of a penalty clause that could amount to an acceleration of anticipated profit?

Mr. DOKE. There are contracts that would say, primarily multiyear contracts, that there may be a cancellation fee, but it will not accelerate profit because under the termination for convenience clause, if they cancel, there's a strict formula that says you get your cost and only a profit on completed work, not any profit on uncompleted work.

Mr. JOHNSON. I just wanted to jump in, Mr. Longley. That particular example that you shared with us this morning is really an unfortunate incident.

What we're looking at doing right now, in my opinion, in accordance with FASA and H.R. 1670, is to change that type of mentality when it comes to Federal procurement.

You mentioned 1986 or 1987, the timeframe approximately 8 or 9 years ago?

Mr. LONGLEY. Earlier than that, '84.

Mr. JOHNSON. At IRS, we have a mission within our procurement organization, and that is we want to buy the right product and the right service at the right time at the right price. Our business is service. Obviously, that particular mission is not consistent with what you had to deal with.

Now, in that fixed price environment, like what was already eloquently stated, the risk is on you to perform. But however, we will recognize the fact that a business is in business to make a profit, and there are some stipulations which mandate up to a certain percentage that you can earn under a Government contract.

But I'm here basically representing our front-line procurement professionals to state to the committee this morning that we are committed to a mindset which is consistent with the National Performance Review, consistent with FASA, consistent with H.R. 1670, whereby we are willing and ready to change that mindset of the contracting officer, but we're looking for that buy-in from our management staff and from our executives.

When all of us get on the same sheet of music, we can make the Federal procurement process that much better, be it large business, small business, women-owned, 8(a)—across the board. That's what I'm here to articulate this morning.

Mr. LONGLEY. I respect that. I guess the point I'm trying to drive at is I think one of the difficulties we're trying to address is that in the private sector, relationships are a primary factor in a business environment.

In other words, I might know you and you have some personal confidence and trust in my ability to perform a certain service or supply a certain product, and that's a very subjective evaluation.

Coming back to Mr. Doke's point, that he doesn't want to feel that he or his client's in a situation where an individual is excluded from being considered. Obviously, anyone who's been in sales understands that dislodging an existing relationship is a very difficult process because people prefer to deal with people who they've dealt with before.

What I'm really driving at is when you mention the three or four different acts, and maybe the fourth or fifth or sixth different acts, what we've effectively done is turn the process into a regulatory game. Frankly, that takes away totally from the ability of an individual to exercise any common sense whatsoever, because I don't care how smart you are, you're going to be subject to attack based on some presumed nuance that somebody can find in some paragraph of some law or regulation, and you're going to get tied up or run the risk of being thrown into court strictly on the basis of the abundance of verbiage that we have constructed, in the form of regulation and law, designed to simplify the process.

Dr. KELMAN. Congressman Longley, I think it's fair to say that you have just expressed the views on this topic both of the President and of the Speaker of the House.

Chair MEYERS. But I do think that you kind of hear what you want to hear because what I hear him saying is that he is very concerned about this nuance and this flexibility that can come into the system. What H.R. 1670 says is let's increase that.

Dr. KELMAN. Maybe I misheard. Sir, were you saying you're afraid that the system had too much flexibility? Maybe I did mishear you.

Mr. LONGLEY. I look very favorably on suggestions that we take however hundreds of thousands of pages of procurement regulations there are and we consign them to the incinerator and that we start over. We've added act on top of act on top of act, with the net result that we've just expanded exponentially the potential for inducing confusion and delay in the process.

I'll just give you a very quick anecdote, and this might summarize where I'm really coming from. If you've read Benjamin Franklin's autobiography, he has a section where he talks about at one point in his life he was a vegetarian. This coincided with his deciding to take a boat from Boston to Philadelphia.

Being at sea, they were becalmed and without food. He noticed that the sailors on the boat were pulling in fish and eating them. Of course, he as a vegetarian, entered into a mental debate over whether or not a fish was meat.

After 3 or 4 days, he finally concluded that he noticed that when the fish were gutted, that there were other fish inside the fish. So he concluded that if they ate each other, there was nothing wrong with him eating them. The summary paragraph or line was that "What a wonderful thing it is to be a reasonable person, since it enables one to make or find a reason for anything one has a mind to do".

Mr. LONGLEY. That is what I'm suggesting is the problem with a lot of the statutes and regulations that we're adopting. We are literally, in our desire to simplify the process, actually making it far more difficult.

I think we need to get right back to some very basic issues, which are that yes, we're going to have to trust some people, and maybe the focus ought to be on how do we exercise two principles. One is openness, and second is oversight.

Dr. KELMAN. I agree with you completely.

Chair MEYERS. Thank you very much, Mr. Longley. Mr. Bentsen and then I would like to recognize Ms. Maloney. She is not on the committee, but she has stayed with us through the entire questioning period and I'd like to recognize her. Mr. Bentsen.

Mr. BENTSEN. Thank you, Madam Chair.

Dr. Kelman, I have to echo my colleague who just spoke. I have had some experience in contracting with State Governments and local governments, and sometimes you wonder whether to not we are making it harder in our efforts to make competition greater, that, in fact, the Government ends up not getting such a good deal.

I appreciate what you're trying to do or what you think about H.R. 1670 and the idea of looking at past practices and looking at

quality, maybe going back to some of the goals of the Brooks Act, the Brooks language, when that came about.

I would like to ask, though, and Mr. LaFalce talked about this, the question of litigation, and whether to not while we're trying to achieve this flexibility that, in fact, we might end up with increasing the avenues for more protests, more litigation. Is there a process by which we'll see, if we were to enact H.R. 1670, would we see agencies' contracting officers write rules that are tighter, in order to address that?

Dr. KELMAN. Sir, I think that's a fair question and it's a fair concern. I think that what the Administration is asking for is two things in this regard.

First of all, we're trying, in the bid protest area, for information technology procurements, to change the statutory regime which currently makes it, to be quite honest, too easy for a disgruntled vendor, for almost any reason, to go and sue their customers, a concept that has no correspondence in the commercial world. So we're trying to change that statutory regime to put it more back in balance.

Second, I think that as I read the purpose of H.R. 1670, in giving more statutory encouragement or backbone to the idea that we are going, in the context of a competitive system, and we want a competitive system—I want to underline that—in the context of a competitive system, we're going to try to find ways to streamline the process and to introduce greater judgment into the process.

By Congress endorsing that approach in statute, it seems to me, and then further implementing regulation, you're reducing the opportunities for litigation by people who claim that there was "too much subjectivity" or various other kinds of allegations that basically come down to saying the contracting officer did this terrible thing: They used their judgment and common sense.

So I see H.R. 1670, or particularly the provisions of H.R. 1670 that authorize more streamlining and more use of business judgment, as congressional backing for reducing litigation, by saying we're going to run a more common sense system and we're going to allow our folks to use more common sense.

Chair MEYERS. If the gentleman would yield, I believe that Mr. Berger would like to comment on this, and then I think Mr. Doke would like to comment, if you have no objection.

Mr. BERGER. Yes, thank you, Madam Chairman.

I think it's fair to say that whenever Congress acts, in any arena, but we'll confine our remarks to the procurement area, it will give rise to more protests, simply because whenever you have a new congressional enactment, you have new words on the statute books and there's always somebody who's going to want to test those words, find out what they mean, find out what they mean in any given circumstance.

So, for some period of time, there's always going to be litigation that is spewed forth simply because Congress has given us a new law or Congress has changed the law. We saw it happen with CICA. I'm sure we're going to see it happening with FASA, and we'll see it with any other enactments that come along.

In the long term, I think it's entirely possible that when there are less detailed requirements in the laws and regulations and it's

clear from the law that judgment areas are being carved out, so long as those judgments are being reached in some reasonable way, there won't be quite the same basis for protest as you might see under more strict rules and regulations.

So, in the long term, you may see a lessening of the litigation. But I want to come back to something that Mr. LaFalce asked before. You asked about numbers. Governmentwide, in terms of all procurements, not just IT procurements. The rate of protest is very small. In fact, the number of protests that are received is probably less than 1 percent of the total number of contracts that are awarded.

Chair MEYERS. I appreciate your bringing that out.

Mr. BERGER. Of that 1 percent that are protested, a very small fraction of those, far less than half, actually go through the entire protest process and result in a formal decision and, along the way, hold up the existing procurement.

So overall, it's always been my judgment that the protest process, in general, overall, does not provide a real undue burden on the procurement system. In fact, what it probably does, as Mr. Doke alluded to in his testimony, is help the overall system.

Chair MEYERS. Mr. Doke.

Mr. DOKE. Yes, the only basis on which to protest a contract award is on the basis the Government violated a law or a regulation. There's no basis to protest that someone disagrees with the judgment. There's case after case that says that.

The reason we have so many protests is the Government doesn't tell competitors what the rules are, and they have to protest to find out why they have lost. The Government doesn't disclose the evaluation plan. The Government doesn't disclose the rating system, how they were graded.

The only way a competitor, who's spent \$1 million or \$500,000 to prepare a proposal, can find out why the contract was lost is to file a protest, and then, in discovery, it gets surfaced.

If we would just require them to disclose it up front, which makes good business sense—these are the rules we're going to play by—then a protest would not be necessary.

Now, Congress can reduce the amount of protests by legislative fiat, but if you do that, you're just going to let the Administration and procurement officials bury their mistakes, and let them go unsurfaced, and I don't think that's good for the system.

Dr. KELMAN. If I could just give my views on this briefly, I agree with Mr. Berger that the protest system at GAO that involves about 90 percent of our procurements works well to balance the proper function of a protest system and the ability to conduct an intelligent procurement. We think the system does work well there. There's a modest number of protests, and so forth.

Unfortunately, at this other body that was set up by the Competition in Contracting Act of 1984, I wish I could say were the case that decisions are only overturned if there's a violation of law or regulation. We just had a case 2 or 3 months ago involving a major Air Force procurement where the successful offeror was chosen based on their superior past performance and another contractor lost with a significant record in the evidence of poor performance and a poor willingness to satisfy the customer.

The protest body, the GSBICA, overturned the decision of the Government because it had not provided a quantitative dollar value for how much the improved ability of the winning contractor to satisfy the customer, to deliver on time and so forth, they haven't given a quantified dollar value of why that was worth more than the small price premium which the more reliable contractor had offered.

So I wish it were the case that at GSBICA currently, this other body for information technology procurements, that decisions are only overturned where there's a violation of law or regulation. That's what the Administration is asking for. The Administration's proposal for bid protest reform at GSBICA asks that they be reined in so that they only overturn the decision of a contracting officer if it violated law or regulation.

Chair MEYERS. Dr. Kelman, if the gentleman would yield?

Mr. BENTSEN. I will yield.

Chair MEYERS. There are thousands and maybe millions of contracts, Government contracts, a year, and there are like 200 or 300 protests.

Dr. KELMAN. At GSBICA—there are about 200 or 300 protests at GSBICA, which only involves the information technology procurements.

Mr. LAFALCE. GSBICA is—

Dr. KELMAN. I'm sorry. I apologize. General Services Board of Contract Appeals. This was the body that was set up in 1984 in the Competition in Contracting Act to have jurisdiction over bid protests for information technology procurements.

Most of the information technology procurements are for several thousand dollars. People don't protest those. The problem is that for our large procurements, protests are a way of life. Indeed, there was something recently, just to give an example, recently in the computer press, in fact, the decision that I just referred to that ended up being overturned.

When the contract was awarded, *Federal Computer Week* stated, before any protest came in, said it was expected there would be protests over this contract because the contract was hotly contested and there was so much money involved. Nowhere in the article did it say it was expected there'd be protests to this procurement because the Government did a bad job, because there was a violation of law or regulation, because there was an impropriety in the procurement.

That's not what it said. It said it was expected there would be a protest because it was a hotly contested procurement. Disappointed vendors have been encouraged by the current statutory framework to—

Mr. LAFALCE. Do you have the audacity to charge that the landmark 1984 Competition in Contracting Act might be imperfect?

Dr. KELMAN. It needs—it did many good things but it also needs some improvement.

Mr. LAFALCE. Thank you.

Mr. BENTSEN. If I might quickly follow up, Mr. Doke, you said that one thing would be if there was just disclosure of the criteria that's used, that these are the points we're going to grade and, as

a result of that, you think that that would reduce even further the number of protests?

Mr. DOKE. I definitely do. You tell people how the game is going to be played. Like in any type of competition, if you know the rules, then you don't have to file a lawsuit after it's over to find out what the rules were and why you lost.

Mr. BENTSEN. Let me ask Dr. Kelman this. I mean, is that provided at this point or is there some form of disclosure that's provided for?

Dr. KELMAN. Absolutely. Statute currently provides that an agency needs to disclose its evaluation criteria and give a relative ranking. What Mr. Doke would like is a more specific thing where we say 42 percent is price, 16 percent is this, 18 percent is that. In our view, that would be a step in the wrong direction. It would put a straitjacket on the process that would—it's completely contrary to common sense and to the way any normal person makes a business decision.

Mr. BENTSEN. But under your proposal, some contracts would be price-based; some contracts would be quality-based? It varies?

Dr. KELMAN. Some mixture, absolutely.

Mr. BENTSEN. But would there be three or four standards? I mean, would you be able to apply those to individual contracts, or is it going to be a situation where we're going to go buy some planes and we may use this standard, we may use that standard?

Dr. KELMAN. No. Again, the law currently requires that your evaluation criteria be stated and that indeed it requires that the relative importance be stated.

We think that in general, that's a good sort of compromise between the interests that the system has in disclosing to people basically what the Government wants, but not putting us in such a straitjacket.

We do believe——

Mrs. MALONEY. Would the gentleman yield?

Mr. BENTSEN. Yes, I'll yield.

Mrs. MALONEY. Just to clarify your point in the amendment that Mrs. Collins passed on the floor restoring full and open competition; taking the place of "maximum practicable," we now have "feasible" in the place of maximum practicable. But in her amendment, she had a clause that attempted to take care of this problem that said that there would be a vendor information conference at the end of a contract award so that the contracting officer would sit down with the various people who bid and give them information or inform why they weren't selected. That was part of her amendment.

I also want to mention that one of our panelists talked about this, Mr. Derek Vander Schaaf, when he suggested a two-step proposal and evaluation process that would give the information up front and weed out contractors who are not appropriate right in the beginning, so you wouldn't have the problem.

So I just wanted to clarify those two things.

Dr. KELMAN. But the Administration—I very much appreciated Derek Vander Schaaf's support of that. That's really one of the key things the Administration is asking for this year: An opportunity, in the context of open access to the system, to give anyone an op-

portunity to come in, for the Government to ask, rather than making people develop these enormous proposals, to ask for some basic information, easy for people to get in, including people who now refuse to do business with the Government because it's so complicated, to come in, provide some basic information, and then be told you're a serious competitor or not a serious competitor, and then can go on and develop the more full-blown proposal. That's a key thing.

Mrs. MALONEY. Dr. Kelman, I think that's an excellent solution, to keep full and open, but take Mr. Vander Schaaf's recommendation and have a step under it where you do exactly what you said. But to be able to let the contractor make a decision to exclude a full range of people I think is terribly dangerous. I'd rather let them come through the door, then adopt his—how many years have you been a contracting officer?

Mr. VANDER SCHAAF. I've been an inspector general for 14 years. I've been deputy inspector general since 1981.

Mrs. MALONEY. OK, 14 years of experience, more than any of us. Fourteen years of experience on line. He's come up with a compromise solution that solves Congresswoman Collins' feelings on full and open and small business community and Congressman Clinger's desire to winnow out early those people who are not appropriate.

Congratulations. I think that is the amendment that we should work on. We'll save full and open.

Mr. VANDER SCHAAF. Actually, I can't take credit for that. I think the Administration, at least the people in the Defense Department—I don't know about OFPP and OMB, but I know the people in the Defense Department support what I proposed there.

Frankly, there's a good deal of ability to do that with the existing statutes. Unfortunately, our contracting officers don't always exercise the authority they have. We could use some new language with respect to a two-step process. I believe there's some question as to whether we can do that now.

But clearly, if you spell it all out, that you're going to go to a two-step process, you can do it. But you've got to lay it all out in detail.

So I think there's some simplification to be done here but I am with you, Madam, full and open competition means let's give everybody a shot here initially. They're smart people. If they don't want to spend the money to go through the paperwork to put the bid in, they won't do so. But just to cut them out because they're not on some list—some of these words that are in this bill are, I forget the exact terms; I had them in my statement—they're a little bit scary to me. Government contracting people can get lazy in this process and say "It's not doable and I don't want to mess with it," and away it goes.

Mrs. MALONEY. Would the gentleman yield?

Chair MEYERS. Mr. Doke has been wanting to respond for some time, so let's go back to him and then back to Mr. Bentsen and if he wants to yield, why, that's fine, Ms. Maloney.

Mr. DOKE. Representative Collins had an even more important amendment in the FY 1996 DOD authorization bill, and that would require the source selection plan be disclosed up front so everybody would know what the game is.

The law right now, and has for a number of years, says that the Government must disclose evaluation factors and significant subfactors and their relative importance. But the Comptroller General has held for years that it's sufficient if the Government says that cost is more important than technical, or technical is more important. That is the relative importance.

Now, the Federal Acquisition Streamlining Act last year put in a new requirement that says you have to disclose if all factors other than cost are significantly more, about the same, or significantly less than cost. But you don't know what that is. There may be a list of 50 items involving technical. You can say that's significantly more, but what do those consist of?

Mrs. MALONEY. Madam Chair, I think this is a critical point. May I ask a question just on his point?

Mr. BENTSEN. I yield to her for a second.

Mrs. MALONEY. I think this is a critical point and I'd like Dr. Kelman's response to it. What is the problem in doing what he's saying?

I'll just go back to some experiences that I had in New York, where the contracting officers—of course, the Federal Government would never do this, but the contracting officers knew what certain areas were going to be weighted and they told their particular friends what the weights were going to be.

What's wrong with telling all the public that we'll say, the machinery content is going to be 50 percent, the technology is going to be rated 12 percent, and let the people know so that then it comes in? That, to me, is a more open system.

See, I don't understand the problem in not doing what this gentleman is saying. Please explain it to me.

Dr. KELMAN. Let me first, Congresswoman Maloney, go back to the previous thing you raised with Derek Vander Schaaf about a two-phased process. The ability to use a two-phased selection process is one of the key reforms the Administration has been asking for this year.

Mrs. MALONEY. Yet it's not in this bill.

Dr. KELMAN. You mean in H.R. 1670.

Mrs. MALONEY. Right.

Dr. KELMAN. We've asked that it be put more explicitly in H.R. 1670. We've been told—I understand the report language suggests that they believe that that is what they're intending to authorize.

Mrs. MALONEY. Then why don't we write it? Just take his language and put it right in there? He's a genius.

Dr. KELMAN. The Administration has submitted language to the Government Reform and Oversight Committee asking that that be placed in.

Mrs. MALONEY. May I have a copy of that language?

Dr. KELMAN. Absolutely. I think it's been provided to your staff already, but I'll be happy to get you another copy and I'd be happy to get a copy to other members of the committee.

Mrs. MALONEY. I'm not staff, so I haven't seen it.

Dr. KELMAN. That's a problem around here, isn't it?

Mrs. MALONEY. A big problem.

Dr. KELMAN. Now, on evaluation factors, again, what the law currently requires is that evaluation factors be disclosed and that, as Mr. Doke said, their relative weight be disclosed.

That's already required by law. We don't think it's appropriate to go beyond that, to your specific 42 percent and 16 percent, and the reason is it puts too much of a straitjacket on the process and too much—

Mrs. MALONEY. I understand. Thank you. I understand.

Chair MEYERS. Mr. Bentsen.

Mr. BENTSEN. That's my point. Do you really think that limits the subjectivity the contracting officer should have? If you say, 10 percent price, 20 percent technical, 20 percent previous history, 42 percent quality, I mean, you still think that you can't design a contract—if you're getting ready to let a contract or put out for a bid and the contracting officer is going to have an idea of what they want. They're going to have an idea—the agency's going to have an idea, well, this is something that's going to take some creativity and somebody who has some experience in this.

Why can't they, up front, decide what it's going to be, rather than coming back later and saying, "Well, we went into this thinking it was going to be price, but then later, we decided price wasn't as important; we thought it was something else." Why can't you do that up front?

Dr. KELMAN. Again, we do do that. If we start off saying price is most important, we have to continue to make price most important.

What I'm concerned about, though, and let me give you a concrete example that involved a protest case several years ago, where the Department of Defense was buying office automation software for the Office of the Secretary of Defense, including the defense secretary, and they put in that ease of use of the office automation software was going to count for 5 percent of the total evaluation.

They got in a bid that just barely met the mandatory requirements for ease of use, but there were a bunch of things that were not in the requirements, that were just not there, and again, this is why we got these longer and longer specifications, because somebody thinks of some way to game the system.

Somebody gamed the system, came up with a product that met the requirements but was essentially almost impossible to use. What happened in that evaluation team was they sat there and said, "Oh, my God, what happens when the assistant to the Secretary of Defense comes and says, 'Who bought that crap?'"

But they were limited by the fact that it was only 5 percent, so they could only grade it 5 percent. They ended up counting it a little bit more, departing a little bit from the 5 percent. They lost the bid protest.

That's what I mean by too much of a straitjacket.

Mr. BENTSEN. But then you're saying, if I understand correctly, that 5 percent was driving the other 95 percent of the bid.

Dr. KELMAN. In other words, they had to give them the award because they couldn't grade them down enough because it only counted for 5 percent. What they realized as they learned more was that maybe we made a mistake; maybe it actually should have been a little more than 5 percent.

Mr. BENTSEN. Why not then restructure the bid process?

Dr. KELMAN. That's true. You'd have to go back and redo the whole thing.

Mr. BENTSEN. But maybe why not do that? Would IBM do that?

Dr. KELMAN. IBM would never, in a million years, put itself into a straitjacket where they announced to any vendor in advance that this is going to count 10 percent. They would never conceive of doing it. It would never happen in the private sector.

Mr. BENTSEN. Let me ask one last question, and I know my time is up. This is just for the record. Is there any shortage of bidders for any Federal contracts in any category?

Dr. KELMAN. I think that, and maybe Derek can come in on this one, in some defense areas we have a shortage because of some of the consolidation. I think, in general, we normally have enough bidders. At the same time, there are many businesses, particularly small businesses, that refuse to do business with the Federal Government because it is too complex, the proposal costs are too great, and so forth.

Now that I'm in this job, I see various friends of mine who work for small companies of various sorts. I ask, "Do you ever think of doing business with the Federal Government?" and they say to me, "We've looked into it, but who can do these kinds of proposals? It's ridiculous."

We do get enough bidders generally, with the exception of some areas involving defense, defense industrial base things, but there are a lot of firms that refuse to put up with all the bureaucracy that we've imposed because we have not been willing to let people use their judgment.

Mr. VANDER SCHAAF. Could I add something to that? Let's exclude the big contracts which are, one-half of 1 percent. They're far less than that, even of our total contracts. Let's talk about 99 percent of our contracts—

Mr. LAFALCE. That's the number of contracts, not the dollar amounts.

Mr. VANDER SCHAAF. That's right, but let's talk about the actions that we have to do. There aren't many suppliers who can even meet the requirements for the B2s and the ships and so forth. Let's get that off the table.

What I'm trying to do in the Defense Department, and I think Dr. Kelman and I are in complete agreement on this, is we want to open up a lot of common commercial items where people have found their way in the door because they understand the Government process, and nobody else wants to really take them on, and people are comfortable with them.

Let me give you some examples. The 10 biggest meat suppliers to the commercial industry in the United States don't supply any meat to the United States Government. The same thing happens for all the wood suppliers. You look at all the major wood suppliers in the country; not one of them sells to the United States Government.

I could go through the business of—I'm trying to think of some of the others we've done—mostly on textiles, I think we've got pretty much a similar situation across the board.

There are firms out there, not just the giant firms, but there are firms in the middle, small businesses, who would qualify, who just don't want to do business with the Government because it's too complex and don't want to worry about Buy American and whether the foreign content is exactly right or whether I complied with Walsh-Healey or whether I did this or that or all these other things on those contracts, and many of those are under \$100,000 but maybe we ought to even think of raising the threshold for those, we can, in fact, do a quicker job and get better competition. That's what I think everybody wants to do.

Mr. BENTSEN. Thank you, Madam Chairman.

Chair MEYERS. Carolyn, did we get your questions answered?

Mrs. MALONEY. No, I was responding to his statement.

Even if we threw out full and open and gave total discretion to the contracting officer, if some admiral comes down with specs for a particular item that he wants, that doesn't solve the problem. The contracting officer is still stuck with the specs. Am I right, or not?

Mr. VANDER SCHAAF. You are absolutely right. That's part of the problem.

Mrs. MALONEY. So the problem that we're discussing today is not full and open competition. The problem is ridiculous specs that are coming down. That is something that I really understood at this hearing, and I thank the Chairlady for this hearing.

One thing that I'd like to say, that one of my amendments was accepted by the committee and it applied to the contracting officers that everyone is empowering. I looked at the law and there was no qualification for a contracting officer that we are now getting ready to give total discretion of \$200 billion of taxpayer money.

So I wrote a provision that they should be a college graduate and that we should have education and training and empowerment for them, and that was accepted.

I want to say that I have accepted, against my better judgment, the language put forward by Dr. Kelman on bid protests, that really streamlines it. I accept that completely, but I do question any change in full and open. I really support Mrs. Collins on that.

I think to give this broad statement of whatever they're calling it, "not feasible or appropriate," is really extremely dangerous.

I want to say that we've heard of a lot of examples. I come from New York City and we had a standard of deciding whether it was "feasible or appropriate." The contracting officer turned down Motorola, all the major companies in this country, and gave a major contract to a political leader, on technology that didn't exist, on a company that was created the day before and had \$108 in the bank.

So I think it's important that we let other people in and that you have oversight. I feel very strongly about full and open competition. I think that it's really something that we should fight for very strongly.

I'd like to ask the genius over here who came up with the compromise, when you mentioned DOD, you said 99 percent of the contracts are under \$100,000?

Mr. VANDER SCHAAF. The contractual actions. We may have a basic ordering agreement, but the actions—

Mrs. MALONEY. How much money do you contract a year? You're probably the biggest contractor in the Government, aren't you?

Mr. VANDER SCHAAF. What do we run, \$132 billion? We're down. But of that, 99 percent of those actions are under \$100,000, that's about \$19 billion of that \$132 billion.

Mrs. MALONEY. Do you think it should be raised, the threshold from \$100,000, to \$200,000, or do you think \$100,000 is appropriate? Ninety-nine percent are under it, so that throws out 99 percent of your paper—

Mr. VANDER SCHAAF. What I'm concerned about, ma'am, is making sure that we are buying truly commercial. If we have a true commercial item that's got a marketplace, that everybody can determine what the price is, I don't care what that threshold is. We can move simply, we can move fast, and we can get on with our business.

Mrs. MALONEY. How can we accomplish what you want?

Mr. VANDER SCHAAF. What I see the industry trying to do, and much of the defense industry is somewhat behind this, they are trying to describe items that are not truly commercial, items that have not even been introduced into the marketplace, and they're trying to remove some of the safeguards that are there, such as Military Standard 9858A, our quality assurance standards.

Mrs. MALONEY. How do we solve that problem?

Mr. VANDER SCHAAF. By making sure we don't put in a new definition, that H.R. 1670 wants to do, about commercial items. It wants to take away the word—strike a simple little word called "catalogue," very important little word that's in there. If the word "catalogue" goes, I predict that every service contract that we have today will no longer be subject to any kind of post-audit, will no longer be subject to the Truth in Negotiations Act.

Mrs. MALONEY. Excuse me, I don't understand you. Why does catalogue preserve that?

Mr. VANDER SCHAAF. Many of the service contracts, and believe me, that's where we have the biggest problem in the inspector general business: making sure we get what we ordered; we get what's in the statement of work; we get the right people. I'm talking not so much the depot maintenance and the janitorial kinds of things. I'm talking about the major advisory and assistance kinds of service, tech service contracts, et cetera. Big problem.

Now, all of those contracts would, the way I read this change, would be subject to no cost or pricing data. The contracting officer would probably not be allowed to get that information. That is a problem to me.

On the other hand, if it's truly commercial, rolled steel of a certain grade, that's a certain fungible kind of commodity, get on the telephone, there's a market out there, make the bid, pay the price, and I don't care if they buy \$1 million of it or \$500,000 or \$100,000. That's what I think we've got to start looking at.

Mrs. MALONEY. Could you come back with suggested language that pinpoints commercial? See, I'm concerned about the threshold, totally lifting it, but if you could define truly commercial in an appropriate way, and I would lift the threshold.

Mr. VANDER SCHAAF. This has been a big area of contention within acquisition reform today. It's coming up with a definition of

“commercial” that is practical and usable. Some of the industry, particularly the electronics industry, which is moving so fast, wants a definition that, to me, stretches what you and I would call commercial.

[Supplemental information subsequently received from Mr. Vander Schaaf may be found in the appendix.]

I don't know if you were here earlier, ma'am, when we talked about MRI machines.

Mrs. MALONEY. Yes.

Mr. VANDER SCHAAF. The Government wanted to buy an MRI machine that wasn't really a commercial item. Under these new definitions, they would be able to sell us that noncommercial MRI as a commercial one, and I get very nervous about that because then I can't go in and determine if the price was fair and reasonable. Many of our contracting officers don't have a good basis on which to do that.

Chair MEYERS. Mr. Vander Schaaf, when you talk about commercial items, are you talking about commodity-type items?

Mr. VANDER SCHAAF. I'm talking both commodity-type items, where I don't think there ought to be any threshold; I'm also talking about—I call those fungible items. In other words, they lose their specific identity or the industry has a standard for those that is very good, and you can basically cite the standard. I can tell you I want aluminum sheet at a certain thickness and a certain weight, you can get bids for it. You don't have to go through this great big Government process we have to do that kind of thing.

On the other hand, a piece of software may be commercial, but it may or may not be really out there in the marketplace and it may not have established a market price for it. The same way, we may have an MRI machine, we may have 20 commercial ones, but some guy may want some special features built on his with separate bells and whistles, and suddenly that one isn't really marketed, and a contracting officer can end up paying a huge amount of money for those bells and whistles and really not know what they're getting. We've got to be able to go in and get cost or pricing data in those kinds of circumstances.

Dr. KELMAN. Ma'am, could I come in on this one a little bit? One of the high points of my few years in Washington was attending—not attending; I was a witness at a hearing of this committee when Mr. LaFalce was in the chair and listening to him actually really, in real time, reason through a tough public policy question. I think all too seldom, in the context of a hearing like this, are we actually trying to get some work done and solve some problems. I think there's too much posturing in a lot of these hearings, on all sides. I'll include myself in it—on everybody's side.

I do think that we're maybe getting some work done here. I guess my suggestion—I guess Mrs. Maloney is busy talking with a staffer who won't provide her with any information—I know that Congresswoman Maloney has had some objections to the provision in H.R. 1670 that talks about simplified procedures for commercial items.

Perhaps what might make sense—and then you asked Derek to come up with a definition. What if we just went back to the old definition of commercial, off-the-shelf product, and then set the sim-

plified procedures for commercial, off-the-shelf products, rather than the FASA commercial product definition?

Mr. VANDER SCHAAF. Yes, we could live with that. We could work with that, as auditors, and we don't feel the Government puts itself at undue risk.

The old commercial definition, it got changed and we went along with it. When my office went along with the change, we were willing to try it out. But H.R. 1670 wants to expand that definition yet again. We haven't even put the FASA definition into effect and we're already talking about expanding it further. Let's be careful about this.

Chair MEYERS. I think that's my concern. FASA made changes; we don't have the regulations written yet. We don't know how FASA's going to work, and we're changing it again. In some cases, I'm sure that it's probably for the worst. Excuse me, Carolyn?

Mr. LAFALCE. They just agreed that we ought to change FASA with respect to the definition of commercial off-the-shelf.

Dr. KELMAN. For the purposes of simplified procedures.

Mr. LAFALCE. Precisely. Good.

Dr. KELMAN. If that's something that would be an acceptable compromise to Congresswoman Maloney.

Mrs. MALONEY. It comes back to something that I learned at this hearing, and I thank the Chairlady for it. I must tell you, Madam Chair, that with all respect, behind your back you are referred to by the Democrats as the John Dingell of the Republican Party. Now, that's a big compliment.

But we come back to the problem. Even if we have the best definition in the world for commercial items, it seems to me, from what I'm hearing today, the problem in the MRI case was not being able to buy it off the shelf. The problem was that some bureaucrat came up with specs that they wanted that wasn't really a commercial MRI.

I don't know what the answer to that is. I challenge my new-found genius [Mr. Vander Schaaf], to come up with how you handle that. Maybe one answer is more oversight by Congress. I congratulate you on this excellent hearing. I learned a great deal. Thank you very much.

Chair MEYERS. Thank you very much, Mrs. Maloney.

Mr. VANDER SCHAAF. Existing law did handle that pretty well. It said you had to have a market for your product. You had to sell your product out there in the marketplace. You have some catalogues.

Mrs. MALONEY. He's done it again.

Mr. VANDER SCHAAF [continuing]. Occasionally our contracting officers would get browbeat and they would agree to buy something that really truly didn't have a market, and that happens occasionally now. We have a number of criminal investigations involving defective pricing and those sorts of things, but that's a rare circumstance. That's not the real problem.

So I want to keep the lid on this commercial definition, and then you can make acquisitions, for those things, the Government buys, quite simple.

We've got some other ideas. If you're anxious to hear new ideas on how to save some money in this acquisition process, I've got a few more that we're working on.

Chair MEYERS. I think we are very interested.

Mr. VANDER SCHAAF. Bank credit cards, for example, how we pay for this stuff. We have this huge finance system in the Defense Department. Many of these transactions could be cleared through our regular banking system and we would eliminate thousands of Government positions. We'd have to pay for some of them but, I'll tell you, there are some efficiencies there.

We want to make sure the internal controls are in place and the costs don't exceed the savings here, but just looking at the thing, on the surface, I'm convinced that we can do that sort of thing in Government.

Chair MEYERS. Mr. Doke? This'll be the last word.

Mr. DOKE. Mrs. Maloney, I urge you to urge your colleagues always to ask the question, when reformists are urging a change, are they talking about what the Government is buying or are they talking about how it's buying it? Divide each issue, and you'll make a lot of progress.

Chair MEYERS. All right. I can't tell you how good I think this panel has been. You've all just been outstanding and I've learned a lot. Thank you for your patience. Thank you for being with us this morning.

I'll ask the second panel to come to the table.

Would the witnesses appreciate it if we take about a 3-minute break before they come to the table? Why don't we do that? Then they'll all come to the table. We'll be back here about 10 after.

[Recess.]

Chair MEYERS. The hearing will come to order. I am making some phone calls now because I rather imagine that some of our members don't realize that the hearing is still going on. So I think we will have some additional members here in a few minutes. I'm going to start. I'm sorry that the first panel took so long. I thought it was an excellent panel, but I think this one will be well worth hearing, too. I want us to have some more members here.

The first person that we will hear from is Colette Nelson, and she's chair of the Small Business Working Group on Procurement Reform, and Executive Vice President of the American Subcontractors Association in Alexandria.

TESTIMONY OF E. COLETTE NELSON, CHAIR, SMALL BUSINESS WORKING GROUP ON PROCUREMENT REFORM, ALEXANDRIA, VIRGINIA

Ms. NELSON. Thank you, Mrs. Meyers. I'm concerned that I'm here again talking to this committee again about how so-called procurement reform legislation will hurt small businesses, before regulations have even been fully proposed, let alone implemented, for the last round of procurement reform.

My message hasn't changed. Small businesses want to participate in the Federal acquisition system. Small businesses have the skills to meet the essential needs of the Government, and small businesses pay the taxes that allow the Federal acquisition system to exist. Therefore, we've earned the right to participate, if we want

to and if we can provide the services and the products that the Government wants.

I'm going to defer to my colleagues to address some of the specific provisions of the bill because I'd like to address some of the points raised by the last panel, and I think this may be my only opportunity to do so on the record.

Chair MEYERS. I imagine we'll have a lot of that.

Ms. NELSON. First of all, let me say that I very seldom agree with Dr. Kelman, but I would agree with him that small businesses have a pathological fear of giving any power to Government bureaucrats, whether they're from OSHA, whether they're from EPA, whether they're from the IRS or, quite frankly, whether they're Government contracting officers.

This committee and this Congress have done an excellent job, taken major steps in curbing the abuses of other Government bureaucrats. The committee of jurisdiction on this legislation [Committee on Government Reform and Oversight] has taken major steps to curb the abuses of other Government bureaucrats. I can't fathom why they believe that Government contracting officers are a different animal, and the small businesses that I represent can't fathom that, either.

I was taken aback at the disdain with which Dr. Kelman holds special interests. Let me put on the record that I represent small businesses. We are a special interest and we only seem to be special interests when Dr. Kelman disagrees with us. When you're talking about the public employee unions that support his personal agenda or some of the large major contractors, we don't hear that term used.

We've had several book reviews this morning, and I'd like to give one more. I think it might help you understand where Dr. Kelman is coming from. I'm sure at least your staff people and perhaps a few members of the committee have read Dr. Kelman's quite well-written book, "The Fear of Discretion and the Quality of Government Performance."

I'd like to point out two items in the book that will clarify for you his background, his thinking and his experience, why he has come to the conclusions he has come to, and why we disagree with him so completely.

First of all, there is this quote from Dr. Kelman's book: "To be fair, the model that the Government uses of establishing criteria in advance and then judging proposals against those criteria does correspond to a common notion of how one ought to make rational decisions. According to this common view, one should first determine one's goals, then evaluate alternatives against those goals, and finally, choose the alternative that best meets the goals."

He says, "An RFP should set out the Government's goals, the vendor proposal should outline different alternatives, and the Government should then evaluate proposals against the RFP." He says, "Such a method appears to be plausible."

But then he says, "Most organizations, acting outside the constraints of the procurement regulatory system, however, do not make decisions this way," and he proceeds to make a case about why the Government should also not use the most rational system available.

Now, Mrs. Meyers, I'm a part owner of a small business and I assure you when I make purchasing decisions, I don't use this method. He's right. I don't use it. We use AT&T as a phone system because my brother works for AT&T and I don't want to listen to it if I use MCI.

Now, for my day job, I manage a \$2 million budget and let me tell you, we follow rules. We're a nonprofit. I have a fiduciary responsibility to the 6,000 construction subcontractors that contribute to my salary and contribute to that \$2 million budget to make purchases in a rational way. We follow procedures. We have a procedures manual. It doesn't look like the FAR, I'll grant you that, but \$2 million is a lot less than what the Federal Government is spending.

I believe, and the small businesses that I represent believe, that the Federal Government has the same fiduciary responsibility to follow very rational procedures and not arbitrary procedures established by a contracting officer.

I want to read one more thing from Dr. Kelman's book urging statutory authorization for experiments in eliminating most procurement rules in favor of a regime with only two broad procedural requirements: Written justification for each procurement decision and multiple-member evaluation panels to reach those decisions.

He is supporting two requirements. Not full and open competition, not publication of evaluation factors, just two procedures. We are opposed to that.

[Mr. Nelson's statement may be found in the appendix.]

Chair MEYERS. I thank you very much, Colette.

Our next witness is Edward J. Black, president, Computer and Communications Industry Association of Washington, and he is accompanied by David Cohen of Cohen & White.

TESTIMONY OF EDWARD J. BLACK, PRESIDENT, COMPUTER AND COMMUNICATIONS INDUSTRY ASSOCIATION, WASHINGTON, D.C., ACCOMPANIED BY DAVID S. COHEN, ESQUIRE, COHEN & WHITE

Mr. BLACK. Thank you, Madam Chairman. It's an honor to be here today. CCIA represents companies from all facets of the computer and communications industry. Our members generate annual revenues of nearly \$190 billion. Many have substantial involvement in the Federal marketplace.

We have, in our membership, many small businesses, and we have a very long history, as an institution, of being committed to a fair, efficient, and open procurement system.

We are very concerned that H.R. 1670, as it now is drafted, has serious flaws which will jeopardize the ability of small- and medium-sized firms to fairly compete in Federal procurements. We cannot support H.R. 1670 in its present form.

The importance of rigorous competition was well understood by both Republican and Democratic proponents of the Competition in Contracting Act. When it was enacted in 1984, Senator Cohen, an author of CICA, said "Competition maintains integrity in the expenditure of public funds by ensuring the Government contracts are awarded on the basis of merit, rather than favoritism."

In this period of budget constraints, the fact is that competition saves money. Vendors regularly reduce their prices when they know they are competing for business.

Prior to CICA, 60 percent of the Government's contracts were awarded on a sole source basis. Today over 70 percent are competitive. The Government, the taxpayers, benefit.

The message should be clear; CICA works. The benefits of competition produced by CICA are directly traceable to: First, full and open competition standard; second, the statutory limitations on noncompetitive procurements; third, the statutory requirement to obtain signed justifications from agency officials for procurements not using full and open competition; and fourth, a strong, fair bid protest system, which was created by CICA, that allows the market to police itself without burdensome regulations or audits.

These four core underlying principles of competition are the linchpins of CICA's success. H.R. 1670 attacks all of them.

First, with regard to full and open competition, the words are back in the legislation, but the meaning has changed significantly. The definition of "full and open competition" has been removed. The previous statutory definition has been replaced with a requirement to obtain full and open competition that provides open access and is consistent with the need to efficiently fulfill the Government requirements.

These are huge loopholes. You can use almost any element of such criteria to say something should be more efficient. It is not a standard by which you can judge procurements. It is not a standard by which supervisors can judge employees or competitors can judge the awards to their other competitors.

We need statutory limits on regulations declaring if, in fact, competition is sometimes found to be infeasible or inappropriate. We need to have statutory limits indicating when, not leave that up to regulation writers.

Our concerns with the blank check given in H.R. 1670 are exacerbated by Dr. Kelman's book and comments over the years. Actually, Ms. Nelson took one of my quotes, but it's a good one. The truth is that he said that he wants to eliminate all rules and regulations other than the two cited. He envisions, we think, a world in which big vendors would, in essence, be developing a Keiretsu-type relationship with protective Government officials. That is not an environment in which many big businesses, much less small businesses, could easily survive.

There is no requirement, the way he envisions the world, we think, to treat vendors fairly, to disclose evaluation criteria, or to evaluate stated criteria, to make any effort at all to obtain additional competition. This is simply too much unchecked discretion.

I will say we have a lot of concerns regarding the \$100,000 threshold being removed. Theoretically, you could wind up with a \$100 million procurement that could be effectuated by conversations with only a few people, based on very subjective criteria. We do not think that is a sensible mechanism to expend public funds.

Let me skip to the bid protest system. We think it is essential that there is a protest system. Whether it is H.R. 1670 or CICA, you need a system to enforce whatever rules you have. The decision to use a bid protest system is a way to let private parties be part

of the process and police it. We think their vigilance is much more likely to lead to a good result, in the end, than relying on a new Government bureaucracy and oversight to do it.

The GSA Board of Contract Appeals (GSABCA) has been surveyed, analyzed, and audited by many. The consensus within industry, companies and associations, academics, and those in Congress who've studied it, is that the GSABCA has been effective and very valuable to the process.

Madam Chair, in summary, we believe that H.R. 1670 should not go forward. We commend you for your interest in identifying the significant problems in this legislation and for trying to correct them before they become serious, real world difficulties for the small businesses of this country who are attempting to compete for Government contracts. We commend you for protecting those small companies that are at risk because of this legislation.

The Federal Government receives much more benefit when many vendors are trying to sell to it than it does when it's buying from a chosen few. The more limited the competition, the more limited the savings. That's a lesson from commercial practices that you can take to the bank. Thank you.

[Mr. Black's statement may be found in the appendix.]

Chair MEYERS. Thank you very much for good testimony, Mr. Black.

Our next witness will be Matthew Forelli, president of Precision Gear of Corona, New York, and he is representing the American Gear Manufacturers Association.

You've been with us before, haven't you?

TESTIMONY OF MATTHEW S. FORELLI, PRESIDENT, PRECISION GEAR, INC., CORONA, NEW YORK, REPRESENTING AMERICAN GEAR MANUFACTURERS ASSOCIATION

Mr. FORELLI. Yes, I have.

Chair MEYERS. We're glad to have you back.

Mr. FORELLI. Thank you for having me. I'd like to thank you, on behalf of my own company and the American Gear Manufacturers Association, for having this follow-up hearing.

It's encouraging to us and fortunate to the whole small business community that someone understands the limited resources with which we function and the fact that we need strong advocates in Washington to even begin to give us a fighting chance.

As you pointed out, I'm here today on behalf of the American Gear Manufacturers Association. We have 350 members, of whom 95 percent are small business. Many of us do participate in DOD's Spare Parts Break-out Program that was generated by CICA in 1984.

At your last hearing I discussed the importance of full and open competition, explaining that any attempt to weaken the practice of full and open competition and shift discretion to the contracting officers would eviscerate CICA.

I will tell you as a parenthetical, Mr. Johnson who was here this morning, in terms of his presentation, was a breath of fresh air to us that deal in the trenches with Government Contracting Officers. He seems like a very competent professional.

Again, we really want to emphasize that the compromise wording of "full and open" is totally unacceptable. We don't believe, as several others have stated, that there would be adequate checks and balances to control the procurement process with anything short of full and open competition in practice.

We haven't had a lot of time to review the text of H.R. 1670, as reported, but we stand by the statements in our last testimony. I think it's a great credit to Mr. Clinger, and whomever else has been working with him, that this bill taken on rocket ship qualities in terms of the speed with which it's going through. Again, we're very thankful that you are giving us an opportunity to do something about H.R. 1670 before it's too late.

In our view, nothing has changed with regard to H.R. 1670's practical impact on competition. While the reported bill maintains the appearance of the standard of full and open competition, it eliminates it in practice. It increases the potential for the use of other than competitive procedures under two broad new exceptions: "not appropriate" or "not feasible".

Another major concern is conditioning the use of competitive procedures, if "consistent with the need to efficiently fulfill the Government's requirement." Again, that new condition will be left to the regulators to define.

Finally, I'd like to again remind the committee that the Competition in Contracting Act accomplished three fundamental principles for procurement, especially by DOD. It saved DOD money; it maintained quality; and it proved to the American public that DOD could provide responsible stewardship of taxpayer money.

H.R. 1670 would undermine much that was accomplished by CICA. If you'll recall the numbers that we presented during our last testimony, the combined savings figures for all the defense procurement agencies are \$20 billion, with a "B," per year since the enactment of CICA through the current procurement cycle. As a taxpayer, I'd call that a pretty significant number.

Again, we ask that Congress think carefully before allowing CICA to be dismantled, losing its accomplishments and the savings to the taxpayer.

Thank you again for helping us.

[Mr. Forelli's statement may be found in the appendix.]

Chair MEYERS. Well, thank you very much for being here. We've valued your testimony both times, Mr. Forelli.

Our next witness is Mr. Hammond, and it's particularly pleasant to have Mr. Hammond with us because he's from my district. He's from God's country. He lives in the fastest growing city in the State of Kansas and maybe one of the fastest growing in the country. I don't know exactly what the population of Olathe is today, but it's in a county of about 350,000. We're very glad to have you with us, Mr. Hammond.

TESTIMONY OF EDWARD HAMMOND, PRESIDENT, K.C. BOBCAT, INC., OLATHE, KANSAS, REPRESENTING NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION, ACCOMPANIED BY JOHN J. MULLENHOLZ, COUNSEL TO THE ASSOCIATION

Mr. HAMMOND. Thank you very much and good afternoon, Madam Chair. I have with me today John Mullenholz, who is counsel to our association.

My name is Ed Hammond. I'm an equipment dealer in Olathe, Kansas. I do want to thank you for allowing us to be here at this hearing on H.R. 1670.

This subject is important to the more than 5,500 equipment dealers throughout the country for whom I'm speaking today. We're one of those special interest groups that Dr. Kelman mentioned, but we feel like we're a significant part of the free enterprise system.

I believe that my comments apply to every small business that sells to State and local governments. I've prepared a statement, which I will not read but ask that it be included in the record. I'd like to make just a few brief points this afternoon.

Stated bluntly, our concern is that the huge General Services Administration has been authorized by Congress to compete directly with dealers, distributors, retailers and wholesalers who have been servicing both the private sector and State, Federal, and local governments on a competitive basis since this country began.

Section 1555 of the Federal Acquisition Streamlining Act of 1994 (FASA), which gave GSA this authority, is in direct conflict with our free enterprise system. As far as we know, the provision of (FASA) which authorizes GSA to go into competition with us was not supported by any evidence of a need by GSA or of any savings to State and local governments.

In fact, the law allows GSA to charge those governments an unspecified fee for its services. From what we can determine, this whole idea is a product of someone who thinks that big Government is good and that it can only get better by getting bigger. That individual clearly has not gotten the message sent by the American people, who are outraged by the size of Government and want to see it reduced.

Furthermore, GSA is moving quickly to take control of the State and local government market. It has already published a long list of products it plans to offer directly to State and local governments.

Apart from the fact that there is no need for this program, the harm that it would cause to the existing dealer, retailer, and distributor networks throughout this country is enormous.

In its submission to GSA on this proposal, John Deere has stated that its dealers do between 20 and 50 percent of their business with State and local governments. Dealerships depend on both sales and service. They cannot survive on one without the other. I do not need to emphasize the impact of the loss of between 20 and 50 percent of a dealer's business.

Section 1555 will do great damage to dealers and distributors in every line of business throughout the country. In turn, their employees and their families will be hurt by loss of jobs. Finally, their governmental customers will lose reliable sales and service facilities.

I cannot believe that this Congress wants to give a bloated Federal agency the anticompetitive power to deprive small businesses the right to sell to State and local governments. Such a concept is contrary to our basic free market system.

I sincerely appreciate having had this opportunity to share small businesses' concerns with you and urge Congress to repeal Section 1555. Thank you.

[Mr. Hammond's statement may be found in the appendix.]

Chair MEYERS. I thank you very much for highlighting this. I think it's a problem that hasn't been recognized, until now, or been the subject of very much comment. I think Section 1555 was included to satisfy a recommendation that was made in the Vice President's National Performance Review. It may have sounded good when it was put on paper, but people may not have realized the impact that it would have on local dealers. I appreciate very much your bringing this to our attention.

Our last witness is Thomas Gunerman. He's president and CEO of Intersurgical, Inc. of Liverpool, New York, and is representing the Health Industry Manufacturers Association. Mr. Gunerman.

TESTIMONY OF THOMAS R. GUNERMAN, PRESIDENT AND CEO, INTERSURGICAL, INC., LIVERPOOL, NEW YORK, REPRESENTING THE HEALTH INDUSTRY MANUFACTURERS ASSOCIATION

Mr. GUNERMAN. Good afternoon, Madam Chair. As you just indicated, I'm the president and CEO of Intersurgical. We're a small, small medical manufacturing company located in Liverpool, New York.

I'm here today to represent Health Industry Manufacturers Association (HIMA), to convey the concerns of the health care technology industry about the implementation of the cooperative purchasing program legislated as part of FASA.

I urge you to consider the appropriateness of the cooperative purchasing program for health care and perhaps other industries, as well. As you may be aware, HIMA represents more than 700 manufacturers of medical products, and 75 percent of HIMA's members are small businesses. Together, all HIMA companies manufacture 90 percent of the \$50 billion of health care products annually sold in the United States.

I'll give to you today three specific points about the cooperative purchasing program of FASA that might produce results which were unintended by the framers of Section 1555.

The first issue is that costs imposed on the Federal Government will likely rise as a result of the cooperative purchasing program. Specifically, \$1.35 billion per year is the current estimate.

Second, the cost to the Federal and non-Federal customers differ significantly. Small business will be seriously disadvantaged.

Third, such a disruption in the distribution channels for health care products could compromise the quality of health care in this country.

HIMA and HIMA members do not object to most of the other reforms in FASA, only to the implementation of a cooperative purchasing program without complete information on its broad effects. Having cited these three concerns, I'll demonstrate, through exam-

ples in the health care industry, why FASA's cooperative purchasing program should not be implemented.

First concern: cost increase to the Federal Government. HIMA requested an economic review of the program to determine what lay beneath the surface in the proposal to expand access to the Federal Supply Schedules (FSS) to State and local governments. As a result of this review, we learned that the Federal Government has had prior experience with a similar business concept in the Medicaid Program.

As part of OBRA [Omnibus Budget Reconciliation Act] of 1990, pharmaceutical companies were required to offer the same discount rates to all State Medicaid Programs that were traditionally offered to their best customers. It was known as the Medicaid Prescription Drug Rebate Program. General economic and business theory has long suggested that discounts decline as the share of market receiving deep discounts expands.

Data from the initial implementation of the Medicaid Prescription Drug Rebate Program in 1991 to the present show that deep discounts did decrease. They decreased by approximately 31 percent when Medicaid, which is about 15 percent of the pharmaceutical market, began to benefit from deep discounts given to other health care providers.

Like the program under discussion today, the Medicaid market sounds large at 15 percent. But actually it is 54 separate programs within the 50 States, the U.S. Territories, and the District of Columbia.

Assuming similar behavior by FSS suppliers from similar market pressures, Federal Government costs would increase by approximately \$1.35 billion per year or \$11.3 billion over 7 years as a consequence of expanding FSS access to additional health care providers.

In the interest of the committee's time, I will submit the details of this analysis for the record and move on to my other two points.

Number Two is that Federal and non-Federal purchasers are entirely different customers. While the volume of their purchases illustrate the most obvious difference, many other distinctions can be drawn which would make successful implementation unlikely.

For instance, post-sale service, electronic communication systems and, most importantly for small companies, credit arrangements. Federal buyers pay very well. Non-Federal buyers take 2 to 3 months, on average, and sometimes over 1 year, to complete payment for orders, placing heavy burden on manufacturers.

While these differences are challenging to any company, large or small, it is the small company that's at greater risk.

Large city hospital systems might be able to order in volume approaching that of a veterans hospital, but what happens to the smaller company if the customer fails to pay? This is a business hazard for any size company, but would small companies have the resources to survive? Slow-paying customers ultimately drive small companies away from Government or private business.

HIMA members already serve State and local health care providers and want to continue to do so, but the contracts need to be tailored. Under a one-size-fits-all concept, it becomes extremely dif-

ficult for a manufacturer to structure a single contract that'll meet the needs of the Federal, as well as State and local, buyers.

What's underlying these basic concerns is the fact that many HIMA members do not distribute their products themselves. Rather, they rely upon distributors as a vital link to make these products available. Many of these distributors are themselves small businesses.

Making states and local agencies eligible for the FSS and its contract arrangement would impose new burdens where there is insufficient capacity to manage the increased volumes or different product lines.

HIMA's third concern is the compromise of the quality of care. HIMA is concerned that the plan may have adverse effects on the present system and might jeopardize the continuity of service for life-saving, quality-enhancing medical products. If the plan results in dislocation among distributors, as we anticipate, many manufacturers cannot fill that void in service.

In summary, let me say that HIMA's economic analysis shows the cooperative purchasing provisions of FASA, although well intended, may actually have the opposite effect. I ask you again to consider our three concerns before implementing FASA's cooperative purchasing program. First, the added cost to the Government would be over \$1.3 billion per year. Second, the difference between Federal and non-Federal customers, especially in credit arrangements, do disadvantage small business. Three, the disruption of the current system and the quality of patient care can be compromised.

Madam Chair, we ask that you and other members of this committee work with the committee of jurisdiction to amend the Federal Acquisition Reform Act, H.R. 1670 when it's on the House floor in September to repeal Section 1555 and save the Government \$1.35 billion annually.

The scope of responsibility of the Federal Government would have to be expanded to accommodate this new program. At a time when Congress is making progress toward downsizing and decentralizing Government, should we enlarge the Government and risk actually increasing its costs?

Thank you for inviting me here today. It's been my pleasure, and HIMA is glad to assist you on this issue in any way that we can.

[Mr. Gunerman's statement may be found in the appendix.]

Chair MEYERS. Thank you very much for being here.

I think I will now ask a question or two and then submit the rest of the questions for written responses. Other members of the Committee may have some questions when they review your testimony. I know I've kept you well beyond the time you thought you would be at this hearing.

I'd like to address one question to Mr. Black. Dr. Kelman is obviously deeply opposed to the bid protest jurisdiction of the GSA Board of Contract Appeals. For him, it's at the root of the problems in Federal information technology procurements. He seems to prefer the GAO bid protest process. Why does he prefer GAO?

Are the IT protests before the GSA Board of Contract Appeals as big a problem as Dr. Kelman believes?

Mr. BLACK. I have comments I'd like to make with regard to your questions, Madam Chair, but I'd like to have CCIA's counsel, Dave Cohen, give you the core of the answers first.

Mr. COHEN. Responding to your two points, I think it's pretty clear from Dr. Kelman's writings that he does not want a strong overseer of the Federal procurement process anywhere. The GAO, while significantly improved as a result of the Competition in Contracting Act, is still not able to provide as strong an enforcement of procurement laws as is the GSA board. There are a couple of reasons for that.

One is constitutional. Given the GAO's position as an arm of Congress, it cannot order executive branch agencies to do anything. It doesn't have that power. Second, its procedures are less robust and less predictable than those of the GSA board. It simply does not have as many of the tools in place to get the facts onto the record.

Second, in terms of the extent of the problem, last year there were about 179 bid protests. Contrary to the figure that Dr. Kelman throws out that 45 percent of IT procurements over \$25 million are protested, more recent data shows that that number is no higher than 20 percent.

The GAO study he cites also showed that less than 5 percent of all information technology procurements were protested.

So to say that a forum which gets 179 cases this year is causing a significant problem in a system that spends, according to Senator Cohen, \$25 billion a year is simply misstating the facts.

Chair MEYERS. I appreciate that response regarding bid protests. I think two of our witnesses on this panel have very strong objections to permitting State and local governments from purchasing off of GSA's Federal Supply Schedules. Is this the first time that State and local governments have been allowed to do so?

Mr. HAMMOND. Yes.

Mr. GUNERMAN. To our knowledge, it is.

Chair MEYERS. Mr. Hammond and Mr. Gunerman, Dr. Kelman seemed to dismiss your concerns with the cooperative purchasing authority in Section 1555 because it is permissive rather than mandatory authority. How do you respond to that?

Mr. GUNERMAN. I guess I'd have to understand what he means by "permissive."

The issues that face us in the health care industry is there's already an assumption that it's all the same. In our own town of Syracuse, we have VA hospitals and extra-private hospitals and extra-State hospitals, and the type of patient care that exists in those hospitals differs dramatically, by the nature of the patients that come in.

Therefore, the patient care, patient service, the need for the infrastructure is an absolute underpinning to our concern, I think, that exists.

When he says "permissive," it is assumed that all things are the same, and all things are not the same. The ability to get servicing throughout three different shifts in a hospital, the ability to get education throughout the hospitals are issues that are not as heavily drawn upon because it is primarily the VA system who is close

to 45 percent of all the purchases running through the system, that is drawing through these funds.

The ability to simply say, "It is available," I think, is to assume that it just lays there benign and people will just randomly pick at it. It would be much more pervasive and it would go to reflect both the strengths and weaknesses you see throughout the country. What Section 1555 authorizes could effectively become the largest central contract in the country. It could effectively create a massive centralized bureaucracy for procurement, running totally counter to Congressional objectives.

So I don't see it as just: They can, if they choose to. It would truly alter the way health care is delivered.

Chair MEYERS. Thank you, Mr. Gunerman. I recognize Mr. Hammond. Then I think Ms. Nelson would like to speak to this.

Mr. HAMMOND. One of the problems is that any time you make something optional, then you have to have the infrastructure in place to back up that option. So the fact that it's optional does not decrease the cost to the Federal Government, because they have to have the facility in place to implement the option if it's exercised.

So the Government's cost is going to be a lot higher if the program's optional. Of course, I think you take a lot of the local decisionmaking out of the process when you don't allow them some latitude.

One of the things I see in the equipment business is the products that are required in Florida are not the same products that are required in Alaska. To make a generic product that fits both state and county government needs is going to be impossible, and it may be some kind of a monster and undesirable for either application.

Chair MEYERS. Thank you, Mr. Hammond. Ms. Nelson?

Ms. NELSON. Mrs. Meyers, for the record I wanted to emphasize that the Small Business Working Group opposed this provision last year during the drafting of FASA and continues to oppose it.

I think when Dr. Kelman refers to it as permissive, he means that the local government or the State government doesn't have to buy off the Federal Supply Service lists. It is the buyer's decision.

Let me point out, however, that they are also driven by cost considerations. What will happen is that a small business that might want to compete at the local level will now be required to either apply to get on the Federal Supply Service's Schedules and compete appropriately to win a Schedule contract, or he will have to compete locally with this massive Federal organization that my compatriots have described. I'm not sure that many small businesses have either the ability or, quite frankly, the desire to do either.

If the intention is to drive small businesses out of the acquisition system, this is another provision that will successfully do so.

Chair MEYERS. Mr. Gunerman.

Mr. GUNERMAN. Madam Chairman, in my written statement I say that in health care alone, if local governments were taking part in this program, the purchases of health care products, which right now are \$2.5 billion, in my world I deal with Ms but here its Bs, would escalate to \$6.3 billion. That is just a massive, massive movement of activity inside this country. I can't even estimate how many more people we need to take care of that here in Washington.

Chair MEYERS. Thank you.

I appreciate very much all of your being here.

Mr. Black, did you want to make a comment?

Mr. BLACK. If you would indulge me.

I didn't use my opening statement to have time to make a couple of comments on the statements of earlier witnesses. It included one or two points, if I could make them very quickly.

Dr. Kelman emphasized a number of faults in the system. Frankly almost everything he described as a fault is curable, and it's curable by executive branch action. The procurement system really has a great deal of discretion now, in fact, to correct the matters highlighted.

That's one of the reasons new legislation is not necessary. We would like to get on with implementing FASA, look at those regulations. We think that FASA and its implementation will take care of a lot of the problems identified by Dr. Kelman.

To underline that, I thank him for bringing the contracting officer from Treasury because of his response to your question. He described a procurement system that is working and is working better because they are beginning to implement FASA. Mr. Johnson specifically said the system is not broken. Coming from a Government contracting officer, these were very telling comments.

Next, I have a background in international trade. I find it very ironic that I've been battling to open-up foreign markets. What we face in Japan and other countries is procurement systems which are closed. We fight and argue all the time for more objective criteria. We want clear standards. We don't want Keiretsu. The more I use that term, the more I think that's really what we are creating, a very favored set of close, cooperating government-chosen vendors, and everybody else is out.

As a Government, I think we run a real risk of asking everybody else in the world to move in one direction while we may be moving in the other direction. I think that's something that maybe some other committees, when they really think about it, will react to. There's a real inconsistency here that I think is worth pointing out to people. Thank you for indulging me.

Chair MEYERS. Ms. Nelson?

Ms. NELSON. Mrs. Meyers, I was expecting my colleagues to address the importance of Government buyer's using clear, precise, and detailed evaluation factors. Since they did not, I would like to just take 1 minute of your time to do so.

The sponsors of H.R. 1670 say that one of their objectives is to dissuade firms from entering competitions they have no real chance of winning. Mrs. Meyers, no business person gets up in the morning, goes to work, and says: "Hey, look, I just found this notice in the CBD [Commerce Business Daily]. We don't have a snowball's chance in winning it, but let's put in a bid because we just want those contracting officers to really suffer evaluating our offer."

Putting together a proposal is a lot of hard work.

Small businesses look at the CBD, and say: "This is something we'd be interested in; let's look at the specifications."

Unfortunately, the specs they get frequently are anything but specific and clear. The business is forced to make the best decision it can about whether or not to invest its resources in preparing an offer. It's not a decision they take lightly.

So I have to agree with some of the members of the prior panel who emphasized rather than punishing small businesses for their failure to determine psychically what the Government wants, the agencies should specify in a lot more detail what they want to buy. The greater the exactitude, the greater the specificity of the evaluation factors, the greater potential is that an unqualified contractor will not enter the competition.

Chair MEYERS. The more specific they are, the more people are going to be able to determine whether they want to bid, whether they're qualified to bid. It's going to reduce the number of unqualified bidders, reduce the number of protests. I think what you're saying is accurate.

I thank you all very much for being with us. We appreciate your testimony tremendously and I'm sorry we kept you all so long.

[Whereupon, at 1:58 p.m., the committee was adjourned, to reconvene subject to the call of the chair.]

APPENDIX

**Statement of Representative Eva Clayton
House Small Business Committee
Small Business Participation in Federal Contracting
H.R. 1670, The Federal Acquisition Act of 1995
Public Hearing
August 3, 1995 - 10:30 a.m.**

Madame Chairman, I want to commend you for your continued focus on a very important subject. The issue of which standard to use in government contracting, full and open or maximum practicable, has far reaching implications and should be treated with careful deliberation.

Since this Committee's last hearing, on June 27th, the House Committee on Government Reform and Oversight held a mark-up on H.R. 1670. The Bill passed by voice vote and provides, with certain exceptions, that procurement should be handled through "full and open competition." However, the marked-up Bill fails to include critical language related to the limits of less than full and open competition as well as the requirements to justify less than full and open competition. Thus, some have suggested, the Bill, as amended, maintains the appearance of full and open competition, while, in practical effect, eliminating it.

I continue to believe that it is absolutely important that we closely examine H.R. 1670, as reported by the House Committee on Government Reform and Oversight. This proposal affects some two hundred billion dollars in goods and services to the federal government. It is a major legislative initiative, affecting many of our citizens.

Several troubling provisions remain in the marked-up version of H.R. 1670. The Bill broadens, in a very significant way, the ability of those implementing its provisions to authorize the award of contracts through other than competitive methods and procedures. Two new and broad exceptions to competitive procedures are allowed; When use of competition is not "feasible" or "appropriate", competitive procedures may be abandoned. The Bill also makes the current, statutory exceptions to competition merely illustrative, thus opening the door for other exceptions as deemed necessary by those implementing the law. And, the Bill conditions the use of competitive procedures with language that states, "consistent with the need to efficiently fulfill the Government's requirements." Thus, there would appear to be great and subjective latitude in decisions about competitive procedures.

The verification provisions, the use of "special simplified procedures" for the purchase of commercial goods, at any dollar amount, and the debriefing process continues to be a concern that I have. I, therefore, again look forward to this hearing, Madame Chairman, with great anticipation. The provisions of this Bill are too sweeping and far reaching for anything except close and careful scrutiny.

STATEMENT FOR CONGRESSMAN FLOYD H. FLAKE
BEFORE THE SMALL BUSINESS COMMITTEE
AUGUST 3, 1995

GOOD MORNING MADAM CHAIRMAN AND MEMBERS OF THE COMMITTEE. MADAM CHAIRMAN, I AM PLEASED TO DISCUSS AND EXPLORE THE IMPLICATIONS OF H.R. 1670, THE FEDERAL ACQUISITION REFORM ACT OF 1995. THE OBJECTIVE OF THIS LEGISLATION IS TO ENSURE EQUAL OPPORTUNITY TO ALL INDIVIDUALS IN COMPETING FOR GOVERNMENT CONTRACTS. I BELIEVE THAT COMPETITION IS THE BASIS OF FREE ENTERPRISE AND THE FOUNDATION OF OUR ECONOMY. THEREFORE, IT IS IMPERATIVE THAT WE PROVIDE SMALL BUSINESSES WITH THE NECESSARY TOOLS TO COMPETE IN THE MARKET PLACE. FURTHER, I BELIEVE THAT SMALL BUSINESSES ARE THE ENGINE OF OPPORTUNITY AND THE FORCE BEHIND ECONOMIC GROWTH AND JOBS CREATION IN THE UNITED STATES; HENCE, WE WOULD BE REMISS IN NOT REMOVING ALL IMPEDIMENTS TO ECONOMIC OPPORTUNITIES FOR SMALL BUSINESSES.

NOTWITHSTANDING, I BELIEVE THAT WE SHOULD CONTINUE TO FULFILL OUR HISTORICAL ROLE OF ESTABLISHING GENERAL GOALS OF COMPETITION AND DESCRIBE GENERAL METHODS OF ACHIEVING REAL COMPETITION AND ALLOW THE EXECUTIVE BRANCH TO CRAFT SPECIFIC REQUIREMENTS AND "RULES" OF COMPETITION.

THERE APPEARS TO BE NO EVIDENCE, TO DATE, THAT WE SHOULD ENCROACH ON WHAT WE HAVE VIEWED AS A TRADITIONAL EXECUTIVE BRANCH FUNCTION, IN THE PROCUREMENT AREA, AND PRESCRIBE SPECIFIC CONTRACTING REQUIREMENTS.

HOWEVER, I BELIEVE THAT WE ARE TOTALLY JUSTIFIED IN ENSURING THAT THE BASIC TENETS OF FAIR COMPETITION, AS OUTLINED BY THIS BODY, ARE MAINTAINED AND INSTITUTED. TO THAT END, I FULLY SUPPORT THE STANDARD OF FULL AND OPEN COMPETITION IN GOVERNMENT CONTRACTING, WHICH PROVIDES MAXIMUM OPPORTUNITIES TO SMALL BUSINESSES. I WILL PAY CLOSE ATTENTION TO WHETHER H.R. 1670 UNDERCUTS THE STATUTORY PROTECTIONS OF THE FULL AND OPEN COMPETITION STANDARD.

AGAIN, I WOULD LIKE TO THANK YOU MADAM CHAIRMAN FOR HOLDING THIS IMPORTANT HEARING AND I OFFER MY COMPLETE SUPPORT AND COOPERATION TO YOU MADAM CHAIRMAN AND ALL THE WITNESSES HERE TODAY.

STATEMENT OF CHAIRMAN DON MANZULLO
BEFORE THE HOUSE SMALL BUSINESS COMMITTEE

AUGUST 3, 1995

10:30AM ROOM 2359 RHOB

Madam Chair, I am pleased that you are holding hearings on the potential impact on small business of the procurement reform bill (HR 1670) that is moving through the House. As Chairman of the Small Business Procurement Subcommittee, it is important that all committee members recognize the implications of the proposed changes to our current procurement system.

Earlier this year, there was an effort to attach this legislation to the Defense Authorization bill. At the heart of this bill is a change in procurement standards from "full and open competition" to giving procurement officials the authority to keep competition open to the "maximum extent practicable."

That means if a procurement official wishes to restrict competition for contracts

to as few as three companies, it would meet the criteria outlined in HR 1670. In other words, it would be very difficult for a small business with a new, innovative product, which is less expensive than a similar good produced by a large company, to sell to the federal government. And, because many state and local governments follow federal standards, this could have grave implications for all government procurement.

The Small Business Administration (SBA) estimates that participation of small business in federal government contracting saved the taxpayer \$219.1 million in 1994. On behalf of the taxpayer and good government, let's go slow on this legislation so that we first review the impact of the changes of last year's procurement reform legislation before we embark on another round of reforms.

I look forward to the testimony of the witnesses here before us today. Thank you, Madam Chair.

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The Honorable Marty Meehan
Opening Statement on the Federal Acquisition Reform Act of 1995
August 3, 1995

Good morning. I would like to take the opportunity to thank the Chair, Mrs. Meyers, for holding this important hearing.

I support federal acquisition reform. As I mentioned at the last hearing, I sponsored a procurement conference in my district to discuss federal opportunities with local companies. I also worked with many other members of the Armed Services Committee in the 103rd Congress to pass a comprehensive government wide reform of the acquisition system -- the first in more than a decade.

I am concerned, however, with provisions in this bill that set standards to be used in government contracting. Maintaining full and open competition -- or maximum practicable -- is of paramount concern to the small business community. As it stands now, this bill fails to do so adequately.

Madam chair, small companies in my district depend on statutory limits and guidelines to ensure open competition for federal contracts. I hope today's hearing will provide ample opportunity for the small business community to voice their growing concerns with H.R. 1670, the Federal Acquisition Reform Act of 1995.

**Committee on Small Business
U.S. House of Representatives**

**Hearing
on**

**SMALL BUSINESS PARTICIPATION IN FEDERAL CONTRACTING:
ASSESSING H.R.1670, THE "FEDERAL ACQUISITION REFORM ACT OF 1995",
AS REPORTED BY THE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT ON JULY 27, 1995**

**August 3, 1995
10:30 a.m.**

OPENING STATEMENT

**Rep. Jan Meyers
Chair**

Today, the Committee on Small Business meets to receive further testimony assessing the provisions of the proposed "Federal Acquisition Reform Act of 1995", H.R. 1670, as reported by the Committee on Government Reform and Oversight on July 27, 1995. On June 29th, this Committee met to receive testimony on this bill, as introduced, from representatives of the small business community and others. During that hearing grave concerns were raised about many of the bill's provisions, but especially those that would abandon the standard and practice of "full and open competition", the core principal of the Federal procurement process since the passage of the landmark "Competition in Contracting Act of 1984" (CICA).

During the bill's consideration by the Government Reform and Oversight Committee, H.R. 1670 has become an more formidable analytical challenge, growing from 85 pages to 150 pages. The chairman's mark was only completed the morning of the mark-up. New provisions have been added and many of the bill's original provisions have been substantially revised.

Unfortunately, those provisions which would most likely result in additional obstacles to small business participation, which would invite more non-competitive contracting, and which would encourage a procurement process substantially less open and fair, all have remained in the bill, as reported.

The proponents of H.R. 1670 will point to the continued periodic appearance of the words "full and open competition", and urge that the full and open competition standard has been preserved. The majority of today's witnesses will urge otherwise -- that the standard and practice of "full and open competition", that has been the procurement system's core principal since 1984, would no longer exist, if H.R.1670 is enacted in its current form.

Under H.R 1670, the use of non-competitive contracting procedures will be authorized if competitive procedures are determined not to be "appropriate" or "feasible". The standards to be used by a contracting officer in making such determinations are left exclusively to the regulation writers, without any statutory guidance.

The proponents of H.R. 1670 also urge that CICA's seven exceptions to competition have been retained in the reported bill. But, they have converted from statutory standards to regulations, and then regulation writers are given unlimited discretion to add to the list.

The current rigorous statutory process for justifying and obtaining higher-level approvals for proposed non-competitive contract awards is stripped away. Crafting its replacement is left to the regulation writers, without any statutory standards.

Rather than go on citing the concerns that will be expressed by many of today's witnesses, I would like to conclude my opening statement by highlighting a fundamental concern expressed by representatives of the small business in a July 27th letter to Chairman Clinger. They are perplexed that the sponsors of H.R. 1670 have pursued a theme of eliminating existing statutory standards and substituting essentially unlimited discretion in the regulation writers, a series of "blank checks", to shape a contracting process as they deem appropriate.

Let me quote from their letter:

This approach is contrary to the strong regulatory reform initiatives embraced by the House and strongly supported by the small business community. These initiatives call for restraining the discretion of the career regulatory bureaucracy by establishing precise statutory standards, such as cost-benefit analysis, and effective means to ensure compliance. Clear statutory standards, and an effective protest system, are just as appropriate in the procurement arena.

Today, we have invited a broad array of witnesses to help us understand the likely impact of H.R. 1670 on the procurement system generally, and on small government contractors in particular. It is an exceptional group of experts.

We are pleased to have Dr. Steven Kelman, the Administrator for Federal Procurement Policy. He has long been an ardent proponent of greatly expanding the discretion granted contracting officers, a stance that has often put him fundamentally at odds with many in the small business community. In our dialogue with him this morning, we will be seeking to learn whether the Clinton Administration has formulated a position on many of the provisions of H.R. 1670, which the small business community and others find so troubling.

I look forward to today's testimony. It will be very important, since it now appears that the sponsors of H.R. 1670 intend to seek action by the full House shortly after the Congress reconvenes on September 6th. Such a fast track schedule affords little time for shaping an appropriate response. But given what appears to be at stake, August is certainly going to be a "work period" for the small business community, for me, and for the other Members of this Committee and other committees who are ready to answer their urgent call for assistance.

**Committee on Small Business
United States House of Representatives**

August 3, 1995

Testimony of Representative Glenn Poshard

Madam Chairman, thank you for holding today's hearing examining the Federal Acquisition Reform Act of 1995 and whether the standard of "full and open" competition should be included in this legislation.

Just yesterday, the Small Business Committee's Subcommittee on Government Programs examined some of the problems with sole-source contracting and the effects it has had in allowing small businesses the opportunity to compete for government contracts. I have grave reservations about allowing for "maximum practicable competition," because I believe it will lead us into an increase in sole-source contracting. If this nation's small business community is to continue to grow and prosper, creating important and greatly needed jobs, we must insure small businesses have every opportunity to compete fairly for government contracts.

I supported Rep. Cardiss Collins' amendment to restore the "full and open" competition standard to this legislation when it was offered as an amendment to the Department of Defense authorization bill. If this legislation should come to the House floor for consideration, I want to assure the members of this Committee and the small business owners and operators in the 19th Congressional District that I will support any effort to restore this important language to the bill.

In closing, I want to thank the members of today's panel for joining us, and please know I look forward to hearing each of your testimony on this very significant concern to the small business community. Thank you again Chairwoman Meyers for holding this hearing and for recognizing the importance of this issue to small business.

United States General Accounting Office

GAO

Testimony

Before the Committee on Small Business
United States House of Representatives

For Release on Delivery
Expected at
10:00 a.m. EDT
Thursday
August 3, 1995

PROCUREMENT REFORM

Competition and Notice under the Federal Acquisition Streamlining Act of 1994

Statement of Ronald Berger,
Associate General Counsel



Madam Chair and Members of the Committee:

It is a pleasure to be here this morning to discuss a number of aspects of the Federal Acquisition Streamlining Act of 1994 (FASA) and the regulations being developed to implement the law. The Act represented a significant step towards simplifying the acquisition system. Among other things, FASA:

- lessened restrictions for purchases under \$2,500, or "micro-purchases";
- created a \$100,000 simplified acquisition threshold below which procurements are exempted from a number of statutory requirements; and
- called for the conversion of the procurement system from a paper-based system to an electronic-based Federal Acquisition Computer Network (FACNET).

We recently testified before your Committee on the preliminary results of our ongoing reviews of the implementation of key aspects of FASA. My brief testimony today focuses on the competition and notice procedures that will apply to the various dollar categories of purchases defined in last year's legislation, and their interrelationship with FACNET. The chart accompanying my testimony is designed to illustrate those procedures and how they work for both FACNET and non-FACNET purchases.

FASA in effect sets up three dollar categories for government buys: (1) micro-purchases; (2) purchases up to \$100,000, the "simplified acquisition threshold"; and (3) purchases over \$100,000. The extent of competition required, the procurement procedures to be used, including the notice to be given the vendor community, and the basis for vendor selection, are different for each one.

Micropurchases

FASA established a procurement category of "micro-purchases," or purchases of \$2,500 or less. The Act allows agencies to make micro-purchases without obtaining competitive quotations from suppliers; permits purchases from large business as well as small; and exempts them from the Buy American Act. The micro-purchases category was intended to expedite the procurement process and reduce administrative costs - micro-purchases comprise about 85 percent of the government's procurement transactions. Basically, an agency buyer can walk across the street to buy an item, so long as the purchase price is reasonable. Alternatively, for an agency using FACNET the buyer can advertise a need over the system, and make a quick and efficient purchase that way.

Simplified Acquisition Threshold and Procedures

FASA replaced the \$25,000 small purchase limit with a \$100,000 simplified acquisition threshold. The law then authorized simplified procedures for those purchases, although whether an agency actually can use simplified procedures up to the threshold depends on

whether the agency has a so-called "interim FACNET capability." Interim capability means, basically, that the agency can electronically provide public notice of contract opportunities and solicit and receive responses to solicitations. If an agency has interim FACNET capability, it can use simplified procedures up to the \$100,000 threshold; agencies not yet ready for FACNET can use simplified procedures only for purchases up to \$50,000.

FASA requires an agency to promote competition in this category only to the maximum extent practicable, in contrast to the requirement for full and open competition in other government purchases. These \$2,500 to \$100,000 purchases are reserved for small businesses if at least two small businesses can submit competitive quotations. A FACNET-capable activity could solicit for its needs electronically, and select from among the responses. If a non-FACNET purchase does not exceed \$25,000, according to the regulations issued to implement this part of FASA, and consistent with the standard for pre-FASA small purchases, a contracting official need only solicit three vendors. Since the regulations also encourage the use of oral solicitations, this means that the procurement can be accomplished through as few as three telephone calls. For purchases over \$25,000 and up to \$100,000, an agency not using FACNET would have to publish notice of the acquisition in the Commerce Business Daily. FASA requires that the notice describe, among other things, the procedures to be used and the timeframe for receiving responses and making the award. FASA also requires that vendors be given a reasonable opportunity to respond, and that any timely offer must be considered.

Over-threshold purchases

This category would include any purchase over the \$100,000 simplified acquisition threshold. An agency would have to generate "full and open" competition, which for a non-FACNET agency means publication of the need in the Commerce Business Daily, and consideration of all responses to the agency's solicitation.

* * * * *

Madam Chair, that concludes my prepared remarks. I would be happy to address any questions you might have.

	BELOW \$ 2,500	\$ 2,500 TO \$ 100,000	OVER \$ 100,000
NOTICE	NONE REQUIRED (MAY USE FACNET)	\$ 25,000 AND BELOW - LOCAL POSTING OVER \$ 25,000 UP TO \$100,000 - COMMERCE BUSINESS DAILY (NO SEPARATE NOTICE REQUIRED IF USING FACNET)	COMMERCE BUSINESS DAILY FOR 15 DAYS
COMPETITION	NONE REQUIRED (PRICE MUST BE REASONABLE)	"MAXIMUM EXTENT PRACTICABLE"	"FULL AND OPEN"
BIDDING TIME	NOT APPLICABLE	"REASONABLE OPPORTUNITY"	30 OR 45 DAYS
BASIS FOR SELECTION	LOW PRICE OR BEST VALUE	LOW PRICE OR BEST VALUE	LOW PRICE OR BEST VALUE



CCIA®

Computer & Communications Industry Association

STATEMENT

OF THE

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION

BEFORE THE

SMALL BUSINESS COMMITTEE

HOUSE OF REPRESENTATIVES

AUGUST 3, 1995

666 Eleventh Street, N.W., Sixth Floor
Washington, D.C. 20001
(202) 783-0070

My name is Edward J. Black and I'm President of the Computer & Communications Industry Association (CCIA). The Computer & Communications Industry Association (CCIA) is pleased to submit this testimony regarding H.R. 1670, the "Federal Acquisition Reform Act of 1995." CCIA is an association of some 25 member companies which represent all facets of the computer and communications industry. Collectively, our members generate annual revenues of nearly \$190 billion and have substantial involvement in the Federal marketplace. We have many small businesses as members and among our charter practices is assistance to entrepreneurial companies striving to enter the American economic mainstream.

Although there are many provisions of H.R. 1670 that CCIA supports, the bill as passed by the House Committee on Government Reform and Oversight has serious flaws that will jeopardize the ability of small and medium-sized firms to fairly compete in federal procurements. Because of these flaws, we cannot support H.R. 1670 in its present form.

Under current law enacted in the Competition in Contracting Act (CICA), the Government must use full and open competition in federal procurements unless specific, statutory exceptions apply. The importance of rigorous competition was well understood by the Republican proponents of the Competition in Contracting Act when it was enacted in 1984. As one author of CICA put it "[c]ompetition maintains integrity in the expenditure of public funds by ensuring that Government contracts are awarded on the basis of merit rather than that of favoritism." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 5 (1983).

Equally important in this period of budget constraints is the fact that competition saves money. Studies have indicated that an increase in

competition can save between 15 and 50%. Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 4 (1983). DOD studies in the 1960s reported that "each dollar spent under price competition buys at least 25 percent more."¹ Commercial and Government experience both show that vendors regularly reduce their prices when they know they are competing for business.

There is a broad consensus that CICA has produced its desired effect of increasing competition. Experience at individual agencies confirms this consensus. It was recently reported that the Navy increased the value of its competitive awards from \$9 billion in FY 1982 to \$21 billion in FY 94. The Army doubled its percentage of competitive awards during the same period. Prior to CICA, 60% of the Government's contracts were awarded on a sole source basis. Today, over 70% are competitive.

Based on these successes, knowledgeable analysts of federal procurement have urged the Government to retain current requirements for full and open competition. The last procurement reform group to study the Federal acquisition system, the Acquisition Law Advisory Panel (Section 800 Panel) "concluded after extensive discussion that retreat from the 'full and open competition' standard was neither warranted or wise." Acquisition Law Advisory Panel, Streamlining Defense Acquisition Laws, 1-24 (January 1993). In making this determination, the Section 800 Panel was mindful of Congress' concern that exclusion of one qualified vendor can prevent the Government from having received its money's worth. Id.

¹See Marshall J. Doke, Jr., Competition Requirements in Public Contracting: The Myth of Full and Open Competition, Federal Contracts Report, Vol. 64, No. 3 (July 17, 1995).

The message should be clear: CICA works. And the benefits of competition produced by the 1984 Competition in Contracting Act are directly traceable to:

- The full and open competition standard;
- The statutory limitations on noncompetitive procurements;
- The statutory requirement to obtain signed justifications from senior agency officials for procurements not using full and open competition; and
- A strong bid protest system, created by CICA, that allows the market to police itself without burdensome regulation or audits.

These four guardians of competition are the linchpins of CICA's success. H.R. 1670 attacks them all.

The Attack on Full and Open Competition

First, H.R. 1670 undercuts the full and open competition standard. Although the marked-up bill preserves the words "full and open competition," their meaning has changed significantly. To begin with, the statutory definition of "full and open competition" has been removed. It has been replaced with a requirement to obtain full and open competition that provides "open access" and "is consistent with the need to fulfill the Government's requirements." Agencies are required to obtain full and open competition through the use of "competitive procedures" that provide "open access and [are] consistent with the need to efficiently fulfill the Government's requirements."

This stew of contradictory definitions is a far cry from the straightforward clarity of CICA, which simply requires the Government to permit all responsible sources to compete. By inserting vague exceptions (like "consistent with the [Government's] need") in the open access requirement,

H.R. 1670 makes its competition standard essentially meaningless. The bill encourages tactics traditionally used by Executive Branch officials to avoid competition--tactics that the Competition in Contracting Act was designed to prevent. Executive Branch officials have traditionally relied on vague claims of impracticability as a basis for noncompetitive procurements. According to one of CICA's sponsors "[t]he justification most frequently invoked [wa]s the 'competition is impracticable' exception, which agencies sometimes improperly use to award sole-source contracts." Hon. William S. Cohen, The Competition in Contracting Act, 14 Pub. Cont. L. J. 1, 15 (1983).

The "efficiency" and "consistent with the need" loopholes are bad enough. But H.R. 1670 removes any remaining restraints by allowing the regulation-writers in the Executive Branch to determine when "the use of competitive procedures is not feasible or appropriate."² There are no statutory limits on regulations declaring competition infeasible or inappropriate. Under H.R. 1670, regulations could be drafted to eliminate competition because of agency workloads, desires to work with known vendors, preferences for large businesses, or simply blanket findings by low level officials that competition for a particular procurement or group of procurements was "inappropriate."

Our concerns with H.R. 1670's blank check are heightened by the clearly stated goals of Steven Kelman, the Administrator of the Office of Federal Procurement Policy ("OFPP"). Dr. Kelman, the official responsible for implementing these regulations, has an academic agenda that is deregulatory in the extreme. Dr. Kelman's approach to procurement is laid out in his book Procurement and Public Management, which states:

²H.R. 1670, July 27, 1995 version at 6, lines 10-11.

I favor experimenting with bold changes in the system to increase the judgment that public managers may exercise. I would urge statutory authorization for experiments in eliminating most procurement rules in favor of a regime with only two broad procedural requirements--written justification for each procurement decision, and multiple-member evaluation panels to reach decisions. [Page 91; footnote omitted.]

In Dr. Kelman's "experiment," the rules that provide integrity in procurements are simply blown away. Dr. Kelman seems to envision a world in which big vendors could develop a keiretsu-type relationship with protective Government officials. There is, in Dr. Kelman's world, no requirement to treat vendors fairly, to disclose evaluation criteria, to evaluate based on stated criteria, or to make any effort at all to obtain competition. The entire system is reduced to two points: written justifications and multiple-member evaluation boards. That's it. We believe the motivation of some of the entities pushing this legislation is the belief that their companies will be consistently favored in this new order.

We are highly concerned with legislation that dumps the power to rewrite the procurement system into the lap of this or any other Administrator of the OFPP. This is too much unchecked discretion. If enacted, the blank check in H.R. 1670 will certainly be cashed, and the amount will be more than any of us can afford.

Second, H.R. 1670 takes the same approach to the requirement for agency justifications and approvals before initiating noncompetitive procurements. These too, are left to the drafters of the Federal Acquisition Regulation to impose, or not impose, as they see fit. Without a meaningful justification and authorization process, there is no brake within the agencies to prevent noncompetitive procurements from occurring.

Even more disturbing, H.R. 1670 permits agencies to acquire commercial items, without dollar limits, using simplified procedures defined by the Federal Acquisition Regulation. Under the Federal Acquisition Streamlining Act, these procedures are only available for acquisitions under \$100,000, and, in many instances cannot be used if the procurement exceeds \$50,000. Regulations that are currently proposed for simplified procurements allow agencies to limit competition significantly (in some instances, to no more than three vendors) and to use highly abbreviated procedures for considering quotes or bids. These shortcuts may make sense in relatively small dollar procurements, but H.R. 1670 would allow agencies to use simplified procedures whenever they acquire commercial items. This means that in a \$100 million procurement, the Government could limit the number of proposals considered, dispense with discussions and scoring of proposals, and evaluate past performance based solely on the contracting officer's previous experience with the vendor. See 60 Fed. Reg. 34,750 (July 3, 1995) (proposed regulation 13.106-1 (b)).

There is no reason to limit the use of simplified procedures in every procurement except commercial item acquisitions. While we agree that the Government should be able to use less formality in small dollar procurements than multi-million dollar acquisitions, there is no basis for turning commercial item procurements into experiments that permit contracting officers to apply virtually any procedure (or restriction) they desire.

Some proponents of this change argue that the Government should be able to use commercial procedures (whatever they are) to buy commercial products. This catchy slogan ignores the fundamental differences between commercial and Government markets. Since Government procurements use

public funds, they should not undermine the free market system which relies on competition, success based on merit, and open access to opportunity. On a more fundamental level, the Government market lacks the preconditions that are assumed in commercial transactions. There is substantially less communication between vendor and seller in the Government market than there is in commercial markets. Without improvement in the types and levels of communication, any effort to graft commercial practices wholesale into the federal acquisition rules will produce flawed procurements. Some practices are helpful; some are not.

We are also concerned by Section 106 of H.R. 1670 that establishes vendor verification processes with none of the safeguards contained in current law. Under H.R. 1670, the agency can limit procurements to verified vendors. Furthermore, H.R. 1670 eliminates even the safeguards currently in statute to prevent vendors from losing procurement opportunities because agencies fail to offer prompt, fair, and accurate methods of verification.

The Need for a Strong Bid Protest System

No system--CICA's or H.R. 1670's--can exist without some mechanism for enforcing the system's rules. Meaningful checks and balances are critically important to the long-term success of the Federal acquisition system. H.R. 1670 is to be commended for establishing Government-wide protest fora based on the existing practices of the General Services Administration Board of Contract Appeals ("GSBCA"). Although we prefer the original version of Title IV that established a single, independent board, the two-board system in the marked-up version of the bill can work if sufficient safeguards are put in place to insure each board's independence.

Unfortunately, H.R. 1670 deprives the boards of a critical tool essential to the success of any bid protest system. As a result, the protest system as designed by H.R. 1670 will engender more litigation, and greater costs. For these reasons, we believe that Title IV requires modification before it can be enacted.

A strong bid protest system is one of the major cornerstones of the Competition in Contracting Act. The protest process at the GSBCA, which was established by CICA in 1984, is one of the major safeguards that preserves competition in computer and telecommunications procurements. It allows vendors, small and large, who are injured by Government procurement decisions to challenge those decisions before a neutral judge, in a forum that allows for reasonable discovery and a hearing on the merits. Under current law, the Board must decide all cases within 65 calendar days from the date of filing.

Congress provided the GSBCA with its bid protest authority because the General Accounting Office's ("GAO") bid protest process was ineffective. Congress found that "GAO makes every attempt to give agencies discretion in how and in what timeframe they respond to a protest, and has been hesitant to challenge any but the most blatant agency actions. As a consequence, the current bid protest process does not provide an adequate remedy to those wrongly excluded from procurements." (House Report No. 98-1157, "Competition in Contracting Act of 1984," p.23, October 10, 1984).

Although CICA also improved the GAO protest process, the acquisition community has come to understand that GSBCA processes are essential to achieve fairness and integrity, particularly in high dollar volume procurements. Because of the Board's success, the Section 800 panel recommended that Congress consider establishing a "GSBCA-type procedure

[that] would be available for all types of procurement," not just procurements for computers and telecommunications. (Report of the Acquisition Law Advisory Panel to the United States Congress, p.1-204, January 1993).

The Board has been widely praised by both industry and Congress. The National Security Industrial Association and the Electronic Industries Association strongly supported the Board in House testimony on October 31, 1991, stating that "...the record of accomplishment of the GSBCA since the enactment of CICA in 1984 is an extraordinary success story. The GSBCA is one of the most positive mechanisms in the federal procurement process. Its authorities should be firm and clear...." ("Federal Property and Administrative Services Authorization Act of 1991," Hearings Before the Legislation and National Security Subcommittee of the Committee on Government Operations, House of Representatives, 102d Cong., 2d Sess., p.279 (1991). David Packard wrote to Congressman Frank Horton in August, 1991 that "[T]he General Services Board of Contract Appeals...is a critical check and balance in the ADP procurement system." As described in a conference report, the GSA Board gives vendors assurance that "the Federal procurement system has treated them fairly and honestly without the agency running slipshod over statute and regulations, while agencies are better able to reap the benefits of competition." (House Conference Report 99-1005, "Making Continuing Appropriations for Fiscal Year 1987," pp. 774-75, October 15, 1986). The Board has also been praised by some academic researchers, who note that "protests are an effective means of deterring and correcting agency problems among procurement personnel and, consequently, accomplishing the procurement objectives of the Government."³

³Robert C. Marshall, Michael J. Meurer and Jean-Francois Richard, "The Private Attorney General Meets Public Contract Law: Procurement Oversight By Protest," 20 Hofstra Law Review 1, 2 (1991). These authors also point out that the need for effective oversight is not

The GSBICA is able to achieve these benefits at surprisingly low cost to the Government and the taxpayer. Most protests are resolved in less than 30 days. As a result, the protest process has not significantly delayed high technology procurements. The Office of Federal Procurement Policy was recently required by the House Appropriations Committee to study whether "repeated protests delay the use of equipment until such time as the equipment is technologically outdated." (House Report No. 103-127 on the Treasury, Postal Service, and General Government Appropriations Bill, p. 49, June 14, 1993).

incompatible with the desire for increased discretion in the procurement system. Indeed, the one requires the other:

The fundamental issue is that, in many cases, inappropriate discretion is not distinguishable from appropriate discretion, at least not without the intervention of an oversight mechanism, such as a protest. To illustrate this point, consider a procurement in which the RFP clearly favors IBM. Perhaps IBM has provided excellent service on previous contracts, or has posted an innovative solution to a problem confronted by the procuring agency. Alternatively, the PO [procurement official] may suffer from an appropriability problem. In such situations, how can good discretion be disentangled from bad discretion? This identification issue is not trivial since a PO who is accused of an appropriability problem will naturally plead his case in terms of arguments that reflect sound business concerns. In the current environment, through de novo review, the GSBICA attempts to disentangle bad discretion from good discretion by requiring the PO to provide explicit justification for all challenged decisions.

Id. at 64. (Emphasis added).

The oversight provided through protests is more favorable to the exercise of agency discretion than oversight through audits. The authors note that, "the displacements of audits by protest almost certainly creates incentives for the increased use of discretion by POs. Accusations of malfeasance by an Inspector General are more chilling on the use of discretion because there are no formal channels of appeal." Id. at 67. (Footnote omitted).

Some of the criticism of the bid protest system by the current OFPP Administrator appears to be based on the efficacy of bid protests in reducing sole source awards. The authors state that, "Kelman also points to what we have called overdeterrence as a problem in contract awards. Incumbents, particularly, IBM receive too few awards in the federal market. He believes this problem is caused partly by an overzealous application of CICA." Id. at 63-64 (footnote omitted). (Emphasis added).

OFPP was not able to substantiate this assertion. It noted, for example, that the Department of Health and Human Services reported that in its experience, the average time between filing a protest and final disposition is 34 days, which it believes "does not represent a significant delay in terms of the total procurement cycle, or in terms of the life cycle of modern ADPE." (Office of Federal Procurement Policy, *The Impact of Protest Delay on the Government's Ability to Acquire Current Computer Technology*, p.5, March 1994).

The role of the Board has indeed been one of protection of the public interest. When agency procurements are delayed by successful bid protests, the delay occurred because the agency violated the law and needed to take corrective action. Frequently, this corrective action results in far greater savings to taxpayers than the costs of the entire protest process. In fact, one of the procurements used as a success story by Dr. Kelman in his recent testimony ultimately succeeded because the Air Force appropriately implemented a GSBICA decision. The Desktop IV procurement is now considered as a highly successful acquisition that has resulted in the procurement of nearly 300,000 state-of-the art personal computers by numerous Government agencies. The Desktop IV contracts that were originally awarded had an evaluated life cycle cost of \$1.2 billion. In response to vendor protests, the Air Force unilaterally terminated the contracts before the case was tried by the GSBICA. The Air Force subsequently awarded a contract to a single vendor. The Board found that the vendor had proposed monitors that did not comply with the Trade Agreements Act, and that the Air Force failed to properly apply the procurement solicitation's provisions that required consideration of dual awards. Finally, the Air Force awarded two contracts with an aggregate evaluated cost of \$724 million. Thus, the Air

Force saved approximately half a billion dollars as a result of the protests. In addition, the dual awards that were praised by Dr. Kelman, and that have been one of the major reasons for the procurement's success, were the direct result of the GSBCA's protest decision. And it would be fitting if not only CCIA, but someone in government were to express appreciation to the GSBCA judges who guarded the public interest so very well.

Title IV of H.R. 1670 uses the GSBCA's procedures as a model for the establishment of a Civilian Board and a Defense Board with authority to decide bid protests on all procurements, not just those involving computers and telecommunications. However, the bill removes the power currently given the GSBCA to stop procurements unless the agency establishes that it has urgent and compelling circumstances that require the procurement to proceed. Since GSBCA protests must be decided within 65 days, the amount of the delay is minimal. The effect of permitting contracts to proceed pending protest can be catastrophic to the preservation of an effective protest system.

The concept of suspension was introduced in the protest system by the Competition in Contracting Act. Prior to CICA, agencies routinely awarded and performed contracts during GAO protests. As a result, when GAO granted protests, it was often forced to rule that the cost of terminating the illegal contract was too high, and that no corrective action could occur. Because of these problems, in the pre-CICA era, GAO protests rarely accomplished anything. The protester only obtained meaningful relief in a small percentage of all decided cases. And the major reason for this failure was that GAO had no power to suspend a contract award or contract performance while a protest is pending. Agencies usually moved forward with their contracts knowing they could preclude any possibility of relief

simply by spending money under the contract, and delaying the protest process as long as possible.

Unless vendors can achieve meaningful results in meritorious protests, they will have little incentive to use the system. The bid protest system represents a policy decision to use private companies as enforcers of federal procurement law. This decision has a number of benefits. First, unlike Government auditors, private vendors are almost always "on the scene" when a violation occurs. Second, the protest process provides a mechanism for oversight without establishing cumbersome enforcement bureaucracies. The private sector will not assume this enforcement role without some assurance that it will achieve meaningful results in meritorious protests. The suspension process assures that agencies will not be able to spend money under illegal contracts, and then use the high cost of termination as a reason to continue contracts that should never have been awarded. A recent study published by the Washington Legal Foundation concluded that, "The importance of the suspension cannot be overstated."

H.R. 1670 allows the head of the procuring activity to make the determination that a procurement is urgent and compelling, and removes that determination from the board judge. This process is similar to the bid protest process at the GAO. Current law gives the agency the ability to override a suspension when a protest is pending at the GAO, but not at the Board. This is because the GAO, as an arm of Congress, cannot constitutionally order an agency to stop a contract. The GSBCA can. In FY 93, agencies overrode stays of contract performance in 96 protests. In prior years, almost 200 overrides occurred.

A protester faced with a suspension override frequently protects his rights by suing to enjoin contract performance. Depriving the Board of

suspension authority will increase litigation. The protester will have to file a protest at the Board and an injunction suit in federal court to stop performance. There is simply no reason to deprive Board judges of the power to review agency findings of urgent and compelling circumstances. Encouraging duplicative litigation will only increase the cost of protests, not reduce it.

We are also concerned by the provision in H.R. 1670 which raises to \$20 million the threshold for using simplified procedures to resolve bid protests. Simplified procedures deprive protesters of the ability to take depositions. These procedures also move protests on an extremely fast track to decision within 40 days. This compromises the ability of any litigant to present issues in an understandable form to a judge. For these reasons, we believe that H.R. 1670's original threshold of \$1,000,000 is more appropriate for simplified procedures. We also believe that the standard of review in the marked-up version of H.R. 1670 is too narrow, and should, at a minimum, be broadened to include all of the criteria contained in the Administrative Procedures Act (5 U.S.C. § 706) for overturning illegal agency action.

In summary, we believe that H.R. 1670 should not go forward in its present form. We commend you for your interest in correcting these significant problems before they create serious difficulties for small businesses attempting to compete for Government contracts. We also commend you for protecting those small companies that are at risk because of this legislation. The federal government receives much more benefit when many vendors are trying to sell to it than it does when it is buying from a chosen few. The more limited the competition, the more limited the savings. And that's a lesson from commercial practice you can take to the bank.

STATEMENT

OF

MARSHALL J. DOKE, JR.

McKenna & Cuneo
Dallas, Texas

Before the
Committee on Small Business
U. S. House of Representatives

Regarding H.R. 1670, the "Federal Acquisition Reform Act of 1995,"
as reported by the House Committee on Government Reform and Oversight
on July 27, 1995

August 3, 1995

STATEMENT OF MARSHALL J. DOKE, JR.

Thank you for the opportunity to submit my views to the Committee regarding the competition requirements in government contracting. This statement contains the reasons I believe current proposals to limit competition will have a particularly adverse affect on small business. These remarks reflect minor updating and revisions to my article on this subject published last month; namely, *Competition Requirements in Public Contracting: The Myth of Full and Open Competition*, 64 Federal Contracts Report No. 3 (Special Supplement July 17, 1995). This statement reflects my personal opinions and does not necessarily reflect the views of my law firm or any professional organization to which I belong.

Introduction

The most fundamental difference between government contracting and contracts between private parties may be the legal requirement for competition in public contracting. Individuals and private businesses may contract with whom, for whatever, and in any manner they choose. The private sector may *choose* to obtain some formal or informal competition in purchasing products or services, but there is no legal requirement to do so. Since there is no such requirement, there is no "penalty" for failing to use competitive procedures or for using them improperly. Most non-governmental buyers may make any or all purchases on a sole source basis (even from family members), buy more than they need or can afford, and even accept whatever gifts, entertainment, or "kickbacks" a vendor may offer.

Like private individuals and businesses, "the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases."¹ However, as Mr. Justice Holmes said, the Government needs the protection of publicity and form in order to prevent possible fraud upon it by officers.² Congress, as incident to its power to authorize and enforce contracts, may require that they be carried out only in a way consistent with its views of public policy.³

One of the earliest and most basic "protections" adopted by the Government in public contracting was the requirement for competition. As discussed below, Congress has required the use of competition in public contracting for nearly 200 years. There also is a long history of executive agencies resisting the competition requirements. As stated by the House Committee on Government Operations, government officials often seek to limit the number of vendors that can compete:

This tactic undermines the Federal procurement system and results in excessive costs to the taxpayer. There is, unfortunately, a general attitude pervasive throughout the government that expanding the competitive base for government procurement is too costly, burdensome, and disruptive to agency activities. While the use of competition may not be considered worthwhile by some officials, it is the only way for the government to obtain the best products for the best prices.⁴

Competition is not a procurement *procedure* but an *objective*, which a procedure is designed to attain.⁵ Executive agencies convinced Congress in 1984 that competition could be increased by *relaxing* competitive procedures. These relaxed procedures (putting competitive proposals on a par with sealed bids) have, in many cases, undermined the true goals of competition by allowing contracts to be awarded to higher-priced offerors based on undisclosed rating systems for multiple and subjective evaluation factors such as aesthetics, corporate capability, employment policies, innovativeness, oral presentations, risk, understanding requirements, etc. The increase of discretion in evaluation caused by the subjective evaluation criteria has led to increased bid protests by competitors attempting to learn what rules were applied and why the discretion was exercised to their prejudice.

Since competition is an objective and not a procedure, the goal of competition should be applicable to all products and services acquired by the Government. This means that the goal of competition is not inconsistent with the acquisition of commercial products. Some of the Government's current procurement policies (such as access to records, requirements for cost or pricing data, rights to technical data, etc.) and procedures (specifications, statements of work, inspections) may be impediments to purchasing commercial products, but a requirement for competition is not. The increased acquisition of commercial products will need different *rules* of competition, but the products can be acquired competitively nonetheless.

The bill currently under consideration, H.R. 1670, originally would have changed the statutory requirement for "full and open competition" to a requirement only for "maximum practicable competition." After markup, the bill reported by the Committee on Government Reform and Oversight on July 27, 1995, would require "open access" but only to the extent that it is "consistent with the need to efficiently fulfill the Government's requirements." Limiting competition for purposes of "efficiency" was considered and rejected when this issue was last before Congress in 1984.

The reform effort in H.R. 1670 is well-intentioned, and procurement reform is needed. However, reducing competition is attacking symptoms of the wrong disease. The real disease is the acquisition culture that evades and abuses the procurement system. Reform efforts should concentrate on *improving* competition in ways that will result in

efficiencies, provide opportunities for small businesses to participate, and lower costs to the taxpayers. These remarks review the background of, and current requirements for, full and open competition in government contracting. The serious erosion of the competition requirements, and some of the major causes for such erosion, also will be discussed. For procurement reform to be substantial and effective, these clear problem areas should be addressed by this Committee.

Background

Purposes and Benefits of Competition

The basic purposes of competition in public contracting are to obtain lower prices and avoid fraud, favoritism, and abuse.

The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis. Conditions or limitations which have no reasonable relation to the actual needs of the service and which are designed to limit bidding to one of several sources of supply are interdicted, and render the award of a contract made in such circumstances voidable.⁶

In order to achieve the purpose of competitive bidding by government agencies, it is necessary to eliminate or limit the *discretion* of contracting officials in areas that are susceptible to abuses, such as fraud, favoritism, improvidence, and extravagance.⁷

In addition to ensuring that a procurement is open to all responsible suppliers, competition is intended to provide the Government with the opportunity to receive fair and reasonable prices.⁸ Reports from the House and Senate Committees considering the Competition in Contracting Act of 1984⁹ estimated the savings from competition at between 15 and 70 percent per procurement.¹⁰ Some 20 years earlier, the Department of Defense reported to Congress that its studies showed "that each dollar spent under price competition buys at least 25 percent more."¹¹ One year later, Secretary of Defense Robert S. McNamara told Congress:

Failure to use competition more extensively in Defense procurement in the past has not only resulted in higher prices, but has also deprived us of the benefits of a broader industrial base among suppliers, both large and small.¹²

The benefit of competition both to the Government and to the public in terms of price and other factors is directly proportional to the extent of competition.¹³

The legislative history of the Competition in Contracting Act identified other benefits of competition; namely, curbing cost growth, promoting innovative and technical changes, and increasing product quality and reliability.¹⁴

The last, and possibly the most important, benefit of competition is its inherent appeal of "fair play." Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.¹⁵

History of Competition Requirements

During the Revolutionary War, government purchasing was characterized by sharp practices, profiteering, and kickbacks; over the years, competition and sealed bidding were adopted to combat fraud and abuse.¹⁶ Congress established the requirement for competition in contracting, with formal advertising as the preferred method, in 1809.¹⁷ Various other statutes requiring formal advertising were enacted between 1809 and 1861, when the law requiring advertising for *all* purchases and contracts for supplies or services (except personal services) was enacted.¹⁸ This law, which later became Section 3709 of the Revised Statutes,¹⁹ was the principal government procurement statute until World War II.

Section 3709 did not expressly describe the scope of required competition. The "advertising" method itself suggests unlimited competition. The statute implied, therefore, the broadest possible scope of competition. The Comptroller General referred to the scope of required competition as "full and free" competition²⁰ and "full and open" competition.²¹ He said every effort should be made to "permit the broadest field of competition."²² As stated in a Department of Defense procurement presentation to the Procurement Subcommittee of the Senate Committee on Armed Services in 1960:

Section 3709, Revised Statutes, contemplates that in purchasing for Government needs the *widest competition possible* be had, and that all qualified persons be given opportunity to compete. To confine invitations to bid [to] a comparative few of those in position to supply the needs of the Government is not in compliance with the statute.

(Emphasis added.)²³

At the beginning of World War II, Congress gave the President emergency authority to enter into contracts and modifications of contracts without regard to other

provisions of law based upon findings that such actions would facilitate the prosecution of the war.²⁴ This emergency authority expired at the end of the war. The subject of peacetime procurement was considered by the Procurement Policy Board of the War Production Board, which was composed of representatives of the various contracting agencies. This resulted in a recommendation for new legislation to permit the use of negotiation "rather than the rigid limitations of formal advertising, bid and award procedures."²⁵ This recommendation resulted in the Armed Services Procurement Act of 1947, which contained a general requirement for advertising for bids but permitted negotiation in 17 exceptions contained in Section 2(c) of the law.²⁶

Section 3(a) of the Armed Services Procurement Act stated that, whenever advertising is required:

The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such *full and free competition* as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(Emphasis added.)²⁷ There was no discussion or explanation of the phrase "full and free competition" in the reports accompanying the legislation. For some unexplained reason, the phrase was changed to "free and full competition" when the law was codified as 10 U.S.C. § 2305.²⁸ In recommending the legislation, Congress was told:

The War and Navy Departments firmly support the principle that, in peacetime, competitive bidding should be the ordinary method of procurement. The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation in those exceptional cases where the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising, bid and award procedures.²⁹

The legislative history states that the purpose of the Armed Services Procurement Act was to "return to normal purchasing procedures through the advertising-bid method on the part of the armed services."³⁰ The statutory requirement in formal advertising for "such full and free competition as is consistent with the procurement" also was included in Section 303(a) of the Federal Property and Administrative Services Act of 1949,³¹ which was applicable to civilian agencies and which contained 15 exceptions permitting negotiation.

Current Competition Requirements

In the years following enactment of the Armed Services Procurement Act and the Federal Property and Administrative Services Act, negotiation became less the exception and more the rule. By 1960, negotiation accounted for 85% of all federal contract dollars

and, as a result, the Armed Services Procurement Act was amended in 1962 to encourage the use of formal advertising and to obtain more competition in negotiated procurements.³² Based on its continued concern over the use of noncompetitive procedures, the Senate Committee on Governmental Affairs held hearings in 1982 at which the consensus of the witnesses was that "competition in government contracting may be the requirement, but not the practice."³³ Congress responded with the Competition in Contracting Act of 1984 ("CICA"), the objective of which was to "establish an absolute preference for competition."³⁴

The CICA amended the Federal Property and Administrative Services Act to require that, with certain exceptions, civilian agencies use "full and open competition through the use of competitive procedures."³⁵ The CICA also amended the Armed Services Procurement Act to require (also with exceptions) that bids and proposals be solicited "in a manner designed to achieve full and open competition for the procurement."³⁶ The CICA amended both laws to permit "restrictive provisions or conditions" but only to the extent necessary to satisfy the needs of the agency or as authorized by law.³⁷ The Conference Committee said this and other provisions were included "in order to maximize, rather than limit, competition."³⁸

The Senate provisions leading to CICA had used "effective" competition as the standard for awarding contracts (*i.e.*, a marketplace condition resulting from the receipt of two or more independently submitted bids or proposals).³⁹ The House-Senate Conference Committee, however, substituted the "full and open competition" standard, stating:

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received.⁴⁰

The phrase "full and open competition" was defined in CICA to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals," and the phrase "competitive procedures" was defined to mean "procedures under which an agency enters into a contract pursuant to full and open competition."⁴¹

The strong congressional policy favoring competition also was reflected by the CICA provision establishing a "competition advocate" in all executive agencies with the specific responsibility for challenging barriers to and promoting full and open competition in the procurement of property and services.⁴² This strong policy has been inter-

puted as requiring agencies to satisfy more stringent requirements than previously had been the case in order to enter into contracts using other than full and open competition.⁴³

Exceptions to Competition Requirements

There are nine exceptions to the requirement for full and open competition that are listed here to illustrate the current flexibility in government acquisitions. The first seven are stated expressly in the CICA, the eighth is implied by the CICA, and the last is derived from case law.

1. **Limited Sources** — Full and open competition is not required when property or services are available from one source and no other type of supplies or services will satisfy the agency's needs.⁴⁴ Since 1987, the Department of Defense, National Aeronautics and Space Administration, and the Coast Guard can use this exception if the property or services are available only from "a limited number of responsible sources."⁴⁵ This authority may be used in certain cases for contracts based on unsolicited research proposals and follow-on contracts for a major system or highly specialized equipment.⁴⁶

2. **Urgency** — Full and open competition is not required when an agency's need for property or services "is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."⁴⁷ Agencies using this exception, however, must request offers from as many potential sources as practical.⁴⁸ An urgency justification does not support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement and should not continue for more than a minimum time.⁴⁹ Further, urgency may justify *award* of a contract but not the inclusion of contract options.⁵⁰

3. **Industrial Capability and Availability** — Another exception is available to award contracts to maintain the availability of a facility, producer, manufacturer, or supplier in case of a national emergency or to achieve industrial mobilization or to establish or maintain an essential engineering, research, or development capability to be provided by an educational or other nonprofit institution or a federally-funded research and development center.⁵¹

4. **International Agreements** — Full and open competition is not required when an international agreement or treaty, or the written direction of a foreign government reimbursing the agency for the cost of the procurement, has the effect of precluding full and open competition.⁵² This is the authority used for foreign military sales (FMS) under the Arms Export Control Act.⁵³

5. **Authorized or Required by Law** — If a statute "expressly" authorizes or requires that the acquisition be made through another agency or from a specified source,

or if a brand-name commercial item is needed for authorized resale, full and open competition is not required.⁵⁴ This authority is used for awards under the Small Business Act's Section 8(a) program, purchases from the Federal Prison Industries, nonprofit agencies for the blind or severely handicapped, and government printing and binding.⁵⁵

6. National Security — Full and open competition need not be utilized when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.⁵⁶ Agencies relying on this exception are required to solicit as many sources as practicable, and classified procurements should be competed among all contractors having proper security clearances.⁵⁷

7. Public Interest — The head of an agency may determine that it is not in the public interest to utilize full and open competition for a particular procurement, but Congress must be notified not less than 30 days before award.⁵⁸ This exception was not in the House or Senate versions of CICA but was added by the Conference Committee.⁵⁹

8. Small Purchases — An implied exemption from full and open competition is contained in the CICA provision requiring "special simplified procedures" for small purchases and stating that, for these procedures, the agency shall "promote competition to the maximum extent practicable."⁶⁰

9. Reprocurement Contracts — The Comptroller General has held consistently that, when a reprocurement is for the account of a defaulted contractor, the procurement statutes and regulations governing regular procurements are not strictly applicable, but competition should be obtained to "the maximum extent practicable."⁶¹

Basic Competition Requirements

Overview

Congress historically has established *goals* of competition and described general *methods* of obtaining competition (*e.g.*, advance planning, market research, formal advertising, sealed bids, competitive proposals) but has left the specific requirements and "rules" of competition to the Executive Branch. The legislative history of both the Armed Services Procurement Act and the Federal Property and Administrative Services Act stated that Congress felt it unusual and unnecessary to prescribe detailed and restrictive requirements that could be dealt with appropriately by administrative regulations.⁶² As discussed below, there have been a few "rules" added to the laws in recent years.

No real attempts have been made to evaluate the essential requirements of "competition." Certain elements or rules have been identified by the Comptroller General on a case-by-case basis, and some of these are included in the "rules" for sealed bidding⁶³

and competitive proposals⁶⁴ in the Federal Acquisition Regulation. When the Senate's version of the Competition in Contracting Act used "effective competition" as the standard (as opposed to "full and open competition," which was substituted by the House-Senate Conference Committee), the Senate Report said it was not amenable to rigid definition:

Although "effective competition" is not amenable to rigid definition, a description is important to establish the thrust of the legislation and the rationale for many of its provisions. Five components characterize "effective competition": (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.⁶⁵

The Conference Committee substituted "full and open" competition to emphasize that *all* responsible sources should be permitted to submit bids or proposals.⁶⁶

Maximize Competition

There is one clear description from Congress of the scope of competition mandated by law — the *maximum possible* competition. This is clear from the legislative history of CICA,⁶⁷ the implementing procurement regulations,⁶⁸ and the bid protest cases interpreting the law and regulations.⁶⁹ The Comptroller General has stated that it is a "general rule of federal procurement" that specifications should be drafted in such a manner that "competition is maximized" unless a restrictive requirement is necessary to meet the Government's minimum needs.⁷⁰ The CICA imposes a clear requirement that agencies undertake an *affirmative effort* to maximize competition.⁷¹ The one limitation on the scope of competition required is the CICA provision permitting restrictive provisions or conditions but only to the extent to satisfy the needs of the agency or as authorized by law.⁷²

One result of the requirement to maximize competition is that all offerors must be considered, and no responsible source can be *excluded* from the competition without justification.⁷³ The Comptroller General frequently has stated that he will give careful scrutiny to an allegation that someone has been denied the opportunity to compete for a particular contract.⁷⁴

The requirement to consider all responsible sources does not require an agency to delay a procurement until a particular vendor is able to compete. The requirement for full and open competition does not mean "that an agency must delay satisfying its own needs

in order to allow a vendor time to develop the ability to meet the Government's requirements."⁷⁵ One reason there is no such requirement is that the law defines a "responsible source" as a prospective contractor who is able to comply with the required or proposed delivery or performance schedule.⁷⁶

Rules of Competition

One of the most basic requirements of *any* type of competition (sports, cards, artistic awards, etc.) is that there be rules and that the rules be enforced. Even in business and social relationships, there are "unwritten" rules to which people must conform in order to remain included in the group or avoid "penalties." As the type of competition becomes more sophisticated and the "stakes" grow larger, it is increasingly important that the rules of competition be adequately defined and uniformly enforced. When this does not occur, many participants simply drop out of the competition.

In government contracting, there is a natural conflict between the desires of potential contractors and those of the Government. Potential contractors want very specific information regarding the Government's requirements and the rules of competition in order to decide whether or not to expend the time and effort, and incur the cost, of engaging in the competition. Government agencies pay lip service to competition, but the actual users of supplies or services usually would prefer no competition at all and always chafe at the rules and "red tape" of procurement procedures. The government users usually know the vendor they want or prefer, and describing their requirements adequately for competition in specifications or statements of work often is not a high priority (and, unfortunately, the technical people who do write the descriptions usually are not on a career fast track). Specifications "written around" the product of a particular vendor are frequently developed. It also is amazing that every federal, state, or local government employee who "splits" a requirement to get below a specified dollar threshold for full competition thinks he or she is the first person ever to think of the technique.

One of the most basic principles of federal procurement law is that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis.⁷⁷ If specifications are ambiguous, competitors interpret them differently and, therefore, their bids or proposals are not comparable because their offers are made on a different basis.⁷⁸ *Indefinite* specifications also preclude real competition:

If bidders are invited to offer equipment varying from the specifications to some undefined extent, the bidders may loosely be said to be in a position of equality in that each may offer what he chooses, but there is totally lacking any basis for bidders to know what they are bidding for or against.⁷⁹

These principles also are implied by the statutory requirement that agencies specify their needs and develop specifications in a manner that permits full and open competition.⁸⁰

Even in acquiring commercial products, an agency is obligated to describe the item in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete intelligently on a relatively equal basis.⁸¹

Another fundamental rule of competitive procurements is that all offerors must compete on a common basis. Each competitor has the right to assume that the essential requirements of the solicitation are the same for all bidders or offerors.⁸² Competing on an equal basis encompasses the notion that vendors bid on the same terms, conditions, and specifications.⁸³ When an agency relaxes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements.⁸⁴ The statutory requirement that bids and proposals shall be evaluated, and awards made, solely on the factors specified in the solicitation⁸⁵ also reflects this concept. Also, an evaluation that incorporates more or less than the work that actually will be awarded fails to comply with the requirement for full and open competition.⁸⁶ These rules mean, essentially, that everyone should have an equal opportunity to compete for award of the contract.⁸⁷

The procurement statutes also now include "rules" requiring that all evaluation factors and subfactors, and the relative importance assigned to each, be included in solicitations for sealed bids and competitive proposals.⁸⁸ A new requirement in the Federal Acquisition Streamlining Act of 1994 requires that requests for proposals disclose whether all evaluation factors (other than cost or price), when combined, are significantly more important, approximately equal to, or significantly less important than cost or price.⁸⁹ The statutes include a few very general provisions for opening bids, evaluating bids and proposals, and awarding contracts.⁹⁰

Perhaps the most important rule of government contract competition is that the Government must deal fairly and honestly with all offerors competing for federal contracts.⁹¹ One decision expressed this rule as a requirement that vendors receive impartial, fair, and equitable treatment.⁹²

Adequacy of Competition

The legislative history of CICA suggests the test for full and open competition is whether all qualified vendors are allowed and encouraged to submit offers and a sufficient number of offers is received to ensure that the Government's requirements are filled at the lowest possible cost.⁹³ The propriety of a particular procurement rests upon whether adequate competition and reasonable prices were received by the Government. In this connection, the Comptroller General has said regarding the exclusion of competitors:

An agency has satisfied CICA's full and open competition requirement when it makes a diligent good-faith effort to comply with the statutory and regulatory requirements regarding notice of the pro-

curement and distribution of solicitation materials, and it obtains a reasonable price.⁹⁴

The test is whether a fair and reasonable price is obtained in response to the solicitation and not whether a lower price could be obtained if one or more competitors were given another chance.⁹⁵

Permissible Restrictions on Competition

General Authority

In addition to the statutory *exceptions* to the requirement for full and open competition discussed above, agencies may include restrictive provisions or conditions in their solicitations even where full and open competition is required to the extent necessary to satisfy the agency's needs.⁹⁶ One bid protest decision stated that all procurements involve inherent limits on competition because the use of performance or design specifications is, by definition, restrictive; therefore, the real rule is that specifications cannot be *unreasonably* restrictive.⁹⁷ The right to impose reasonable restrictions under the advertising requirements of Section 3709 was recognized as early as 1895 by the Comptroller of the Treasury, who said that, if the specialized supplies could not be obtained from ordinary dealers, it was permissible to "provide in the advertisement for such supplies that proposals will be limited to the class of people competent to furnish the character of articles required."⁹⁸ Where a solicitation includes requirements that restrict the ability of offerors to compete, the agency must have a reasonable basis for imposing the restrictive requirements.⁹⁹

When a solicitation is challenged as being unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specification requirement is reasonably necessary to meet its minimum needs.¹⁰⁰ In such cases, the Comptroller General reviews the record to determine whether the requirement has been justified. The adequacy of the agency's justification is ascertained by evaluating whether the agency's explanation is reasonable; *i.e.*, whether it can withstand logical scrutiny.¹⁰¹ Stated another way, the issue is whether the restriction is "rationally premised and reasonable."¹⁰²

The Comptroller General does not weigh the advantages and disadvantages of the agency's chosen approach; his sole concern is whether the restrictions are reasonably necessary to meet the agency's minimum needs.¹⁰³ The Comptroller General has recognized that avoiding significant unnecessary delays or avoiding unnecessary duplication of costs may justify restrictions on competition.¹⁰⁴ If a rational explanation is not provided, however, the provision will be held unduly restrictive.¹⁰⁵ The remainder of this section will discuss major categories of circumstances in which restrictions on competition have been justified.

Approved Products

The procurement regulations describe three types of product prequalification that may be used to restrict competition in connection with solicitations for products; namely, qualified bidders list (QBL), qualified manufacturers list (QML), and qualified products list (QPL).¹⁰⁶ These involve the pre-testing of a product to demonstrate compliance with a specification requirement (which is not a responsibility issue of ability or capacity of an offeror requiring referral to the Small Business Administration if the product is not qualified).¹⁰⁷

A procuring agency may limit competition for the supply of parts if doing so is necessary to ensure the safe, dependable, and effective operation of equipment.¹⁰⁸ Such restrictions are permissible where doing so is necessary to ensure the procurement of satisfactory end products or the maintenance of a high level of quality and reliability necessitated by the critical application of a product.¹⁰⁹ The Comptroller General will, however, even review use of a QPL to determine whether the restriction is reasonable.¹¹⁰

There are special statutory requirements that must be followed if qualification requirements are imposed.¹¹¹ Agencies must provide offerors with a prompt opportunity to demonstrate their qualifications.¹¹² This includes informing potential offerors of the requirements that must be satisfied in order to become qualified.¹¹³ The agency also must ensure that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnish specific information why qualification was not attained.¹¹⁴ An agency's failure to act upon a request for approval within a reasonable time deprives the offeror of a reasonable chance to compete and, therefore, is inconsistent with the CICA's mandate for full and open competition.¹¹⁵ However, an agency is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved.¹¹⁶

Bonding Requirements

Although bonding requirements may result in a restriction of competition, an agency may impose bonding requirements in appropriate circumstances as a necessary and proper means to secure fulfillment of the contractor's obligations.¹¹⁷ As a general rule, agencies are admonished against the use of bonding requirements in nonconstruction contracts, but the use of bonding is permissible where needed to protect the Government's interests.¹¹⁸ In reviewing challenges to bond requirements, the Comptroller General will look only to see if they are reasonable and imposed in good faith.¹¹⁹ One area where the requirement frequently has been justified is where the agency states that the continuous operation of services is absolutely necessary.¹²⁰ Bonding requirements have been approved regardless of whether the agency's rationale comes within the four reasons for a performance bond articulated in FAR § 28.103-2(a).¹²¹ The restriction on competition

may be justified even where small business concerns¹²² and small disadvantaged businesses¹²³ may be excluded from competition because they are unable to obtain bonds.

Bundling and Total Package Procurements

Solicitations that combine or integrate separate, multiple requirements into a single contract are called bundled, consolidated, or total package procurements.¹²⁴ Such procurements have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement.¹²⁵ Therefore, the Comptroller General will object to such procurements where a bundled contract or total package does not appear necessary to satisfy the agency's minimum needs.¹²⁶

One justification frequently used to consolidate requirements into a total package is the "single contractor" argument. Bundling has been upheld where a single contractor was required to ensure the effective coordination and integration of interrelated tasks or where procurement by means of separate acquisitions would involve undue technical risk or would defeat a requirement for interchangeability and compatibility.¹²⁷ Another example is where there is a need for a single prime contractor to be responsible for all phases of design, development, and testing.¹²⁸ A single contractor approach for the upgrade of a jet engine was justified on the basis that the Government's buying, storing, and issuing parts on an individualized basis would require excessive effort and would jeopardize the schedule and flow of engines through the government depot facility.¹²⁹ A single contractor approach also was upheld to ensure the effective coordination and integration of interrelated tasks, including the timely availability of components.¹³⁰ The Air Force even supported the need to integrate landscaping and construction requirements into one procurement to allow for "efficient and economical processing of the contract work."¹³¹

An agency's minimum needs include the need to procure supplies and services on the most cost-effective basis, and the possibility of avoiding unnecessary duplication of costs may justify consolidating several requirements under a total package approach.¹³² An agency's decision to procure under a total package approach was upheld in the absence of evidence that the approach did not ensure the most cost-effective method of procuring the items and when, in doing so, the agency avoided unnecessary administrative costs.¹³³ In appropriate circumstances, the agency's staffing resources can and should be properly considered in fashioning contracts that will satisfy the Government's minimum requirements at the lowest reasonable cost.¹³⁴ On the other hand, concern about incurring additional costs can only justify restrictions on competition in unusual circumstances, the existence of which must be clearly demonstrated. Generally, where an agency concludes that having separate contractors may lead to additional costs, the proper course is not to restrict competition but, rather, to structure the solicitation evaluation criteria so as to take all costs into account.¹³⁵ However, in one case, the small size of an agency's contracting staff was held to justify the agency's combining electronic systems maintenance and operation, refuse collection, and janitorial services.¹³⁶

Other reasons used to justify bundling requirements include the need to ensure military readiness,¹³⁷ to avoid unacceptable periods of downtime for an emergency communications system during an upgrade and expansion effort,¹³⁸ and a need to combine educational services to provide for low enrollment areas and to provide for a complete program.¹³⁹ An agency should consider minor adjustments to its bundling of purchases if a protester shows that the structure of the package reduces competition and that it may cost the agency more money than the package will save because of the reduced competition.¹⁴⁰

Contractor Qualifications

The prequalification of *offerors*, as opposed to the prequalification of *products*, generally results in an unwarranted restriction on free and open competition.¹⁴¹ Nevertheless, under certain limited circumstances, the prequalification of offerors may be justified.¹⁴² One example is where an agency needs some assurance from a source independent of the bidder that a safety system (such as a fire alarm) works. Thus, a requirement for certification by Underwriters Laboratory or Factory Mutual has been upheld.¹⁴³ The Comptroller General generally has not objected to a requirement for membership in an industry organization or a requirement that products conform to standards by a nationally recognized organization.¹⁴⁴ However, a requirement for a specific testing laboratory's seal of approval generally is considered unduly restrictive because prospective contractors should be permitted to present other credible evidence that their items conform to established standards.¹⁴⁵

An indirect form of prequalification is to impose specific responsibility-type requirements on offerors. For example, a solicitation requirement for a minimum of two years' corporate experience in providing family service functions was upheld as necessary to ensure high quality services.¹⁴⁶ Another solicitation requirement that certain key staff positions on cable ships be staffed by persons with experience aboard that type of ship also was upheld.¹⁴⁷ Any solicitation requirement stating a specific and objective standard to measure an offeror's ability to perform is called a "definitive responsibility criterion." An agency may include definitive responsibility criteria provided that the criteria reflect the agency's legitimate needs and the restriction on competition is reasonable.¹⁴⁸

Delivery Requirements

One of the best examples of a permissible restriction on competition involves the Government's required delivery for the supplies or services. A short delivery schedule is permissible so long as it reflects the Government's legitimate minimum needs. There is no requirement that an agency understate its minimum needs merely to increase competition.¹⁴⁹ The number of possible sources for an item or service does not determine the restrictiveness of solicitation provisions.¹⁵⁰ Consequently, even if only one firm can meet

the delivery requirements, this does not establish that the agency's delivery schedule is not reasonably related to its minimum needs.¹⁵¹

Geographic Restrictions

An agency may restrict a procurement to bidders or offerors within a specified geographical area if the restriction is reasonably necessary for the agency to meet its minimum needs.¹⁵² One category of procurements in which such restrictions are applied involves the location of buildings for government offices. The Secret Service justified a restriction for its offices to a designated area with a central location in Houston near the Houstonian Hotel (the designated temporary residence of the President while in Houston) with easy access to major arteries to downtown, in a close proximity to the Houston Police Department, close to the Federal Building, and allowing for secured parking.¹⁵³ A restriction to an area near the courthouse was justified on the basis that Justice Department attorneys had to make several trips to the courthouse each day (with bulky files and boxes).¹⁵⁴ The Drug Enforcement Administration excluded the Canal Street area in New Orleans for its office on the basis that the area posed unacceptable security risks for its agents.¹⁵⁵ Government employee travel time also has been held to be a legitimate consideration in determining an agency's minimum needs for office space.¹⁵⁶

The necessity for government employee travel also is a legitimate consideration in assessing an agency's need for geographic restrictions based on other considerations.¹⁵⁷ Restrictions have been upheld based on a demonstrated need for close liaison between agency personnel and the contractor and for close control over documents or data involved in a contract.¹⁵⁸ A geographical restriction was upheld because of the agency's operational need to improve efficiency by minimizing unproductive employee travel,¹⁵⁹ even if only to avoid traffic congestion in a highway tunnel.¹⁶⁰ Geographic restrictions for facilities serving military recruiting stations also have been upheld to increase efficiency, reduce the possibility of highway accidents, and improve the impression on military recruits.¹⁶¹ Travel time is not just a cost consideration. One protester argued that there were commonly used methods of determining travel cost that could be incorporated into the solicitation to increase competition, but the restriction was justified on the basis of quality assurance requirements and to avoid unproductive travel time during working hours.¹⁶²

Security

Military readiness and security considerations to meet possible wartime or emergency conditions is an actual need justifying restrictions on competition in appropriate circumstances.¹⁶³ One restriction which may be needed is a limitation to potential contractors with security clearances. The degree to which classified information must be protected by the use of certain security clearances is a matter within the discretion of the cognizant agency and will not be reviewed under the Comptroller General's bid protest

function.¹⁶⁴ Potential competitors may object that the clearance level is too high, takes too long to obtain, or that the agency will not even initiate the application process until after award. The Comptroller General takes the position, however, that the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if it properly reflects the agency's minimum needs.¹⁶⁵

Standardization

The Comptroller General has recognized that, although there may be some restriction on competition, an agency may specify brand name components to be delivered as part of a system when the agency has a legitimate need for the specific brand.¹⁶⁶ One recognized agency need is to standardize equipment.¹⁶⁷ The need for standardization may involve sophisticated equipment, such as computer keyboards, in order to increase user friendliness and to eliminate time delays when operators must learn to operate new or different keyboards.¹⁶⁸ The need to standardize also may involve less sophisticated operations, such as welding.¹⁶⁹

Urgency

The CICA requires that, even where urgency justifies limiting competition, the agency still must solicit offers from as many potential sources as is practicable under the circumstances.¹⁷⁰ Thus, an urgency determination does not itself justify a decision to award a sole source contract.¹⁷¹ The agency may limit the procurement to the only firm it reasonably believes can properly perform the work in the available time, provided the limitation is justified.¹⁷² Since the agency can limit the competition to firms with satisfactory work experience that it reasonably believes can properly perform the work, the agency is not even required to solicit the incumbent contractor if it reasonably doubts that the incumbent can perform the work.¹⁷³ A military agency's assertion that there is a critical need that has an impact on military operations carries considerable weight with the Comptroller General.¹⁷⁴

Other Restrictions

A solicitation restricted to modified commercial off-the-shelf equipment was justified by the agency's desire to avoid the risks of purchasing an unproven design.¹⁷⁵ An agency may require a firm seeking source approval to provide technical data from the original equipment manufacturer (even if the information is proprietary and difficult to obtain) so long as the data is reasonably necessary to evaluate the product.¹⁷⁶ Solicitations requiring products "compatible" with existing equipment are generally approved.¹⁷⁷ Even a specification requiring uniformity of appearance with the agency's previous acquisition was upheld.¹⁷⁸ An agency may specify items with superior performance characteristics allowing for as much reliability and effectiveness as possible.¹⁷⁹ Some cases hold that a restriction to new equipment,¹⁸⁰ or equipment with a maximum age, is permis-

sible.¹⁸¹ At least two decisions, however, have held that a restriction to new equipment was not justified.¹⁸²

An interesting recent decision involved a solicitation for instructional services that required the contractor to be accredited from one of ten accrediting associations. The protester contended that the requirement overstated the Government's needs because the Army was not awarding degrees, giving academic credit, developing curricula, etc. The Army contended the restriction was necessary to reduce unacceptable risks, such as uncertified teachers, nonexistent lesson plans, and substandard instructional material. The Comptroller General denied the protest.¹⁸³

Erosion of Competition and Purchasing Limitations

Introduction

Contrary to the express purpose of CICA to *increase* competition, there has been a significant erosion of "real" competition in the last decade. A 1987 GAO report reviewing DOD's compliance with CICA discussed awards *reported* by DOD as based on full and open competition but *actually* based on the submission of only *one* offeror.¹⁸⁴ In a follow-up audit three years later, the GAO sampled awards reported as based on full and open competition and the submission of only one offeror and found that the agency had used practices inconsistent with full and open competition for one-half of the sample.¹⁸⁵ The reduction of competition has a direct effect on increased costs to the Government because "the benefit of competition to both the government and to the public in terms of price and other factors is directly proportional to the *extent* of competition."¹⁸⁶

The DOD has an entire program devoted to the shrinking availability of sources of supply and recently indicated that "diminishing manufacturing sources is a major potential problem."¹⁸⁷ A GAO report stated that the DOD does not have systems that provide information on the magnitude and extent of the problem of diminishing sources but the examples listed of *causes* of the problem included only suppliers ceasing production, discontinuing distribution, or moving to a foreign country.¹⁸⁸ The fact that vendors may simply *choose* not to sell to the Government was not mentioned as a possible cause (although the GAO did say that the private sector is increasingly more sensitive to its commercial customers rather than DOD).

In addition to the decline in the *amount* of competition, the *quality* of competition in government contracting has decreased in the last decade. The quality of competition has eroded, not because of the increased use of a particular *method* of competition (competitive proposals), but because of the failure to apply effective rules of competition to this method. Competition by sealed bidding has been recognized for over a century as a method of reducing costs, fraud, and favoritism. The *reason* this method is effective is that the *rules* of competition are fully disclosed (timely bids, responsive bids, evaluation

factors, bid guarantees, etc.), there are objective standards for the competition, the bids are publicly opened to ensure the integrity of the system, and award is made to the low responsive bidder (with "responsibility" determined separately).

There are factors and circumstances currently associated with competitive proposals that are the antithesis to any form of competition; namely, indefinite or ambiguous goals (*i.e.*, products or services), undisclosed rules of competition, discretionary application of the rules, and discretionary enforcement of the rules. The presence of one or more of these factors or circumstances undermines competition and causes competitors to lose faith in the integrity of the system. When this occurs (as in *any* type of competition), many of the best competitors elect not to participate. In most competition, a *bad* rule is better than *no* rule, and consistent application and enforcement of a bad rule often is better than discretionary application and enforcement of a good rule.

Discretion and flexibility are desirable procurement goals in selecting different *methods* of procurement or evaluation factors for different circumstances — discretion and flexibility in applying or enforcing the *rules* of competition to each method or evaluation factor are not. In sealed bidding, when you name the game, you disclose the rules. In competitive proposals, as discussed below, offerors do not know if the "game" is low price, best product, lowest risk, highest quality, etc. Government buyers prefer the "cafeteria plan" of source selection; *i.e.*, look at what is offered and then decide what is "wanted" and what can be purchased with the available funds. This method of selection not only has led to higher prices but also has seriously eroded one of the most basic historical limitations on government spending; namely, the so-called "minimum needs" doctrine that has restrained unnecessary acquisitions for over 100 years. The factors and circumstances that have contributed to the erosion of competition and the limitation on government spending will be discussed in this section.

Specifications

It is a basic tenet of federal procurement law that specifications must be sufficiently definitive so as to permit competition on a common basis.¹⁸⁹ The CICA and FAR require that specifications be developed "in such manner as is necessary to obtain full and open competition."¹⁹⁰ This important and specific statutory requirement (to do whatever is necessary) is almost *never mentioned* in bid protest cases. The Comptroller General has stated that, in addition to treating potential suppliers fairly, they should be informed "as fully as possible of what it is the Government needs."¹⁹¹ Competitors must be given enough information to know what they are competing *for* and what they are competing *against*.¹⁹² "Loose" specifications are similar to the poet Robert Frost's description of free verse — it is like playing tennis with the net down. Contracting agencies have the responsibility for drafting proper specifications.¹⁹³ The preparation of specifications and statements of work is a skill that is rarely emphasized or even recognized in the Govern-

ment (and the development of courses of instruction for government personnel in this area might be the best "investment" the Government could make in cost reduction).

It is a fundamental principle of procurement law that *ambiguous* specifications preclude competition on a common basis.¹⁹⁴ An ambiguity exists if the specifications are subject to more than one reasonable interpretation.¹⁹⁵ For example, a specification requirement for "first class material and workmanship" was not sufficiently definite because the phrase was subject to varying degrees of interpretation.¹⁹⁶ Specifications permitting different offerors to assume different requirements would improperly permit proposals to be prepared on different cost and technical bases.¹⁹⁷ Procuring agencies have argued that industry standards have not been developed and offerors should be permitted to propose whatever product they choose, but the flaw in the argument is that it permits each offeror to define the specification for itself and, to the extent that offerors do so differently, they are not competing on an equal basis.¹⁹⁸ Other government agencies make the equally erroneous decision to reject an offer that interprets the specification differently from the agency.¹⁹⁹ One major problem in convincing agencies that specifications and statements of work should be more definite is the Comptroller General's position that specifications need not be drafted in such detail as to eliminate all risk or remove every uncertainty.²⁰⁰

Precise design specifications describing how a product will be manufactured are not required. The Comptroller General has said, in fact, that design specifications "are generally inappropriate if an agency can state its minimum needs in terms of performance specifications which alternate designs could meet."²⁰¹ Performance specifications leave to the contractor the responsibility of choosing the means, methods, and techniques for accomplishing the contract work.²⁰² The Comptroller General has said he will not object to specifications that are "written around" design features of a particular item where the design specified is necessary to meet the agency's minimum needs²⁰³ but that restricting a solicitation to a specific make and model does not meet the requirement for full and open competition.²⁰⁴

A major problem with ambiguous specifications affecting competition is the risk placed on contractors. If specifications contain a patent or obvious ambiguity, the contractor is under a duty to inquire and seek clarification.²⁰⁵ The problem is the well recognized "grey area" between when an ambiguity is obvious and when it is not.²⁰⁶ The critical issue is the degree of scrutiny reasonably required in reviewing specifications.²⁰⁷ The courts and boards of contract appeals necessarily have the advantage of 20-20 hindsight when deciding this issue (and have not experienced the pressures and time constraints in preparing bids or proposals). In competitive proposals, an offeror can "interpret" the specification in its proposal (shifting the burden of clarification back to the Government) and clarify issues in discussions. However, inadequate specifications always undermine competition, and this factor almost always is ignored in "reform" initiatives. It is a popular misconception that a low price means poor quality. If you are

buying or selling gold and specify 98 percent purity, the price is irrelevant to quality if you *specify* the purity required, *inspect* to assure the product conforms, and *reject* any nonconforming products.

Undisclosed Evaluation Plan

Government agencies enjoy broad discretion in the selection of evaluation factors, and those factors and the evaluation scheme will be upheld so long as the criteria used reasonably relate to the agency's needs.²⁰⁸ As discussed above, the procurement statutes and regulations require that the evaluation factors and subfactors, and the *relative* importance assigned to each, be included in solicitations for bids and proposals.²⁰⁹ The Comptroller General has said it is "fundamental that offerors should be advised of the basis on which their proposals will be evaluated."²¹⁰ He even has released the source selection scoring plan in a bid protest case because it is "necessary to give the protesters a meaningful opportunity to develop their protests."²¹¹ Nevertheless, the Comptroller General has held consistently that only the "broad scheme of scoring to be employed" need be disclosed to competitors in the solicitation.²¹² The precise scoring method to be used need not be disclosed.²¹³ These plans are internal agency instructions and, as such, do not give outside parties any rights.²¹⁴

Although the general rule is that an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any listed evaluation factor,²¹⁵ the failure to disclose the evaluation plan poses a real problem in determining whether this will be done. For example, "experience" might be considered by the agency to be a legitimate consideration under a number of evaluation factors.²¹⁶ "Staffing" is another example that was found to be a legitimate consideration under several evaluation subfactors.²¹⁷ The failure to disclose the plan also may deprive competitors of the knowledge that bonus or penalty points will be used in scoring.²¹⁸ It is particularly difficult to understand how an evaluation plan can be upheld as satisfying the requirements for full and open competition when the undisclosed plan allocated points for performance *exceeding* satisfactory compliance.²¹⁹ In upholding an undisclosed point scoring plan involving a brand-name-or-equal solicitation, the Comptroller General said:

In a competitively negotiated brand name or equal solicitation, we consider unobjectionable comparative technical scoring where non-brand name equipment may receive a higher technical score than the brand name, if its performance is technically superior to the brand name. The solicitation here clearly put offerors on notice that offers would be comparatively evaluated on a point-scored basis, provided technical evaluation factors, and instructed offerors to indicate the extent to which the offered unit "meets or exceeds" the requirements. Consequently, we think it was unreasonable for the protester to assume that a proposal of the brand name would be scored equal to

an offer possessing merit beyond the minimum requirements specified in the RFP. See *generally Computer Sciences Corp.*, B-189223, Mar. 27, 1978, 78-1 CPD ¶ 234. Thus, the fact that the protester may have been misled, while unfortunate, does not render the evaluation improper.²²⁰

Another problem in failing to disclose the evaluation plan is that competitors are unable to determine whether or not the plan will give the source selection official a clear understanding of the relative merits of proposals.²²¹ In one decision, the undisclosed evaluation plan had 10 separate evaluation factors with undisclosed point scores assigned to them for use by the evaluators. The undisclosed evaluation plan even reflected that the technical evaluators were to use a scoring guideline different from that to be used by the contracting officer, who was the source selection authority. The protest was sustained for other reasons, but disclosure of the evaluation plan initially in the solicitation could have resulted in amendments that would have avoided the issues.²²²

It is most difficult to understand why agencies are not required to disclose the scoring system to be used. Disclosure would eliminate the problems of determining the *relative* importance of evaluation factors for disclosure and the problems that will be caused by the new requirement (discussed below) to disclose when factors are "significantly" more or less important than cost. If the scoring system is valid, it should result in the Government receiving proposals more closely responsive to what it wants. If "technical" is rated 90% and cost is rated 10%, proposals will be structured in an entirely different manner than they will be if cost is 90% and technical factors are rated 10%. The only reasonable explanation is that the agencies want to use the "cafeteria plan" selection method of waiting to see what is offered before deciding on the definite scoring. The failure to disclose the evaluation method has an obvious and adverse impact on competition. By analogy to football, it is like having a tie game with one play left and you do not know how many points you will get if you score by running the ball, passing, or kicking a field goal. The Government will get much more "responsive" proposals if it discloses the scoring system.

The writer actually experienced this problem trying to convince the chief procurement officer of a local public agency in the Dallas, Texas, area to disclose the ratings to be used in evaluating the systems offered by competitors. After vague and indefinite answers, the writer asked, "Who knows what the scoring system will be?" The answer was: "Only the Shadow knows."

Undisclosed Evaluation Factors

Undisclosed evaluation *plans* prevent competitors from knowing how evaluation *factors* will be scored. Another significant reason that competition has been eroded is that government agencies do not disclose all of the evaluation factors and subfactors that will

be scored or otherwise considered in the evaluation. This problem exists notwithstanding an absolute, unequivocal mandate from Congress that such factors be disclosed in solicitations.

Congress first required disclosure of evaluation factors in the CICA, which required solicitations to include "all significant factors (including price) which the executive agency reasonably expects to consider" in evaluating competitive proposals and their relative importance.²²³ This provision was implemented in Federal Acquisition Circular 84-5 by providing, in FAR § 16.605(e), that solicitations clearly state the evaluation *factors* and any significant *subfactors* that will be considered in making source selections and their relative importance.²²⁴ The Comptroller General's interpretations, however, emasculated the requirement by holding that agencies did not have to disclose areas or matters that were reasonably related to or encompassed by the disclosed criteria.²²⁵ With respect to subfactors, the Comptroller General held that agencies did not have to disclose subfactors if they were "sufficiently related to the stated criteria so that offerors would reasonably expect them to be included in the evaluation"²²⁶ or were "reasonably related" to the stated criteria and the "correlation is sufficient to put offerors on notice of the additional criteria to be applied."²²⁷ The Comptroller General did not require evaluation subfactors to be revealed to competitors even in bid protest cases.²²⁸

Industry complained to the House Armed Services Committee that the Department of Defense often did not state evaluation factors and that it was difficult to understand what the Government really wanted. This resulted in an amendment to the Armed Services Procurement Act to require expressly that solicitations include a statement of all significant evaluation *subfactors* the agency expects to consider.²²⁹ The committee report accompanying the bill said:

In reviewing this issue the committee became cognizant of an issue that it also believed warranted attention — the quality of the department's statement in the solicitation of the factors on which it will base its source selection decision. Industry complained that the evaluation factors were often not stated or were not sufficiently detailed to allow offerors to understand what the department truly considered important. Without that knowledge they were left to structure offers that were often not consistent with the department's needs. The department, on the other hand, was concerned that if it were required to state in the solicitation the evaluation criteria, including all subfactors, and the weights that would be given those factors, the government would lose flexibility in choosing the best offer, and the subjective judgments it is often required to make would be challenged.

The committee cannot stress enough the importance of the solicitation containing clear and unambiguous descriptions of each significant evaluation factor *and* its relative importance. This becomes even more significant if the department intends to award without discussion. The committee believes it can resolve both the industry and DOD concerns by amending section 2305 of title 10, United States Code, to require the department to include in its solicitations a statement of not only all significant evaluation factors, but all significant subfactors as well. Finally, it recommends an amendment to provide that in prescribing the evaluation factors, the department must clearly establish the relative importance of the factors included in the solicitation. The committee encourages the department to provide as much detail as possible in describing the significant evaluation factors and subfactors.²³⁰

The Comptroller General recognized that this meant the solicitation should contain "clear and unambiguous information concerning how offers will be evaluated."²³¹

The Comptroller General, however, continues to hold that factors "encompassed by or related to,"²³² or "which might be taken into account"²³³ in evaluating, identified criteria need not be disclosed. With respect specifically to the disclosure of evaluation subfactors even by DOD agencies, the Comptroller General's position is that areas reasonably related to or encompassed by,²³⁴ or "intrinsically related to,"²³⁵ the stated criteria do not have to be disclosed in the solicitation. Thus, the Comptroller General held that "risk" did not have to be disclosed as an evaluation factor or subfactor because consideration of risk is *inherent* in the evaluation of proposals.²³⁶ The logical refutation of this position is that, under this view, subfactors *never* would have to be disclosed. *All* subfactors, by definition, are reasonably related to or encompassed by the primary factors (otherwise, they would not be "sub" factors).

The General Services Administration Board of Contract Appeals (GSBCA) takes a different view of the disclosure requirements. In sustaining a protest in which the Marine Corps did not disclose it was evaluating whether, and how much, an offeror's proposal *exceeded* the Government's needs (and to which a dollar value was assigned), the Board said:

The Board has held that any factor which significantly contributes to how a potential offeror structures its proposal or which affects the selection of an awardee should be disclosed in the solicitation. *Systemhouse Federal Systems, Inc.*, GSBCA 9313-P, 88-2 BCA ¶ 20,603, at 104,122, 1988 BPD ¶ 33, at 13. The fact that SAC would be examining the technical proposals to determine whether they exceeded the requirements of the solicitation and would be as-

signing a dollar value to those elements is such a significant factor. Offerors may structure their proposals differently and may include additional features in their proposals based on this knowledge. The proposal an offeror submits based on the terms of this solicitation could be markedly different than the proposal which may have been submitted if the evaluation factors and cost savings adjustment had been disclosed. Thus, the fact that proposals would be examined to determine if they exceeded the requirements of the solicitation and the fact that a cost savings adjustment would be applied to those elements which exceeded the requirements should have been disclosed in the solicitation.²³⁷

The GSBGA's statement explains clearly how competition has been eroded by the failure to apply one of the most basic rules of competition; namely, stating *what* will be scored. It also should be clear that the procuring agencies are depriving themselves of higher quality proposals by failing to disclose all evaluation factors and subfactors. The awardee under the present system may merely be the offeror who had the best guess (or, worse, inside information) about what the Government *really* wanted. One of the best expressions of this argument was made by the Comptroller General in a case in which the statutory requirement to disclose evaluation factors was inapplicable:

Intelligent competition assumes the disclosure of the evaluation factors to be used by the procuring agency in evaluating offers submitted and the relative importance of those factors.²³⁸

The current practices, it is submitted, are inconsistent with "intelligent competition."

Subjective and Unnecessary Evaluation Factors

One of the most important measures of the *quality* of competition is the objectivity of the scoring. There almost never is any doubt regarding the winner of a marathon race or a pole vault competition. What distinguishes these sports from professional wrestling? The answer is *rules* and their *enforcement*. The integrity of the competition is directly proportional to the objectivity of the scoring method. The less objective the scoring method, the more opportunity there is for the mischief that competition is intended to avoid (favoritism, fraud, overspending, etc.). The integrity of the competition requires not only that the judges are satisfied with the winner but also that the competitors believe that they have been treated fairly.

The quality of competition in government contracting has eroded not only because of the increased *number* of subjective evaluation factors used but also because of the increased *subjectivity* of the factors. Subjective scoring permits the judges to postpone deciding *what* they want until after the competitors have completed their participation. This, again, is the "cafeteria" selection method — you do not decide what you want until

you go down the line with your tray. This selection method has a major flaw — we all tend to buy too much when we go through the buffet line. The same is true in government contracting; subjective evaluation permits the Government to pay more for what it purchases (under the euphemism of "best value," discussed below). When non-cost factors are evaluated along with price, a higher score in subjective factors costs the Government more money.

The Comptroller General has held that subjective evaluations are not improper; evaluation factors need only reflect the agency's actual needs.²³⁹ A legitimate question, however, is whether many of the subjective evaluation factors currently being used in federal source selection really reflect the Government's *actual needs*. One offeror was downgraded because its proposal did not show any "creative or innovative thoughts,"²⁴⁰ and competitors in another procurement were rated for their "visionary" approaches.²⁴¹ In another competition, proposals were graded by the offerors' "academic credibility."²⁴² Proposals often are evaluated for the offerors' labor-management relations. One was downgraded in this area because the evaluators reported "several employees were disgruntled because [the offeror] refused to timely grant cost of living wage increases."²⁴³ Another proposal was downgraded for containing insufficiently detailed strike/work stoppage procedures.²⁴⁴ Proposals frequently are graded for the "oral presentation."²⁴⁵ One proposal was found unacceptable because of the contractor's organizational chart.²⁴⁶ A company's plans for quality control also frequently are evaluated,²⁴⁷ and the Comptroller General has recognized that different evaluators will have different perceptions regarding the relative merits of proposed quality control plans.²⁴⁸ However, when a proposal's quality control program is downgraded for an *undisclosed* requirement to include the Government's participation in the quality program, a more objective evaluation method is needed,²⁴⁹ particularly where the evaluation plan assigns more weight to quality than to price.²⁵⁰ Objective criteria are particularly important to describe the Government's actual needs in connection with the evaluation factor of customer satisfaction²⁵¹ (*i.e.*, how much "satisfaction" is enough?).

It may be impossible, or at least undesirable, to eliminate subjectivity in all competitive acquisitions, such as the "aesthetic" evaluation factor for the design of a building²⁵² or the "visual impact" consideration for the design of a bridge.²⁵³ However, some rules, standards, and guidelines for the use of subjective standards (none of which exist today in government procurement) should be established describing the types of factors permitted and the discriminators to be used in scoring. There is subjectivity involved in evaluating gymnastics and diving competitors, but there are well-defined factors that are being evaluated and which are well known to all competitors.

Another reason competition in government procurement has eroded is that proposals are evaluated on the basis of factors that are remote to justifiable actual needs of the agencies. Comparative evaluations of a potential contractor based on the vesting period for its employees' 401(k) plan contributions,²⁵⁴ the employee sick leave policy,²⁵⁵

the part-time or full-time status of employees,²⁵⁶ severance pay policy,²⁵⁷ government contract experience,²⁵⁸ the importance of the contract to the offeror,²⁵⁹ and membership in professional organizations²⁶⁰ seem hard to relate to the Government's actual needs. A comparative evaluation of offerors' minority business participation²⁶¹ can result in the Government paying a hidden price premium for socioeconomic programs. It also is doubtful that Congress recognizes that agencies may be paying a price premium in *janitorial services* for the contractor's corporate reputation, supervisor experience, organizational methods and techniques, and subcontracting plans.²⁶²

Some government requirements and evaluation factors may be imposing standards on government contractors that the Government does not, or could not, adopt for itself, such as employee dress and grooming standards,²⁶³ employee personnel conduct and attire,²⁶⁴ availability of conference room space,²⁶⁵ "pop-up" dispensers for paper towels,²⁶⁶ subsidized hot meal and beverage programs for employees,²⁶⁷ and even evaluation of employees' political views.²⁶⁸ Awarding government contracts based, even in part, on highly subjective, and possibly unnecessary, factors erodes and undermines competition for what the Government actually needs. Government requirements based on personal preferences are improper.²⁶⁹

Responsibility-Type Evaluation Factors

In government contracting, the term "responsible" as applied to a prospective contractor has a well defined and consistently applied meaning; namely, a contractor that can and will perform the contract satisfactorily. To be "responsible," a prospective contractor must (a) have adequate financial resources or the ability to obtain them, (b) be able to comply with the delivery or performance schedule, (c) have a satisfactory performance record, (d) have a satisfactory record of integrity and business ethics, (e) have the necessary organization, experience, accounting and operational controls and technical skills, or the ability to obtain them, (f) have the necessary equipment and facilities, or the ability to obtain them, and (g) be otherwise qualified and eligible to receive award.²⁷⁰ Responsibility determinations are made *after* preliminary source selection (*i.e.*, determination of low bidder or best evaluated proposal) and are a *condition* to *all* government purchases.²⁷¹ A prospective contractor must affirmatively demonstrate its responsibility, including (when necessary) the responsibility of its proposed subcontractors.²⁷²

An agency's consideration of the technical merits or acceptability of proposals traditionally has been separate and distinct from consideration of an offeror's responsibility.²⁷³ However, the Comptroller General said:

It is not always possible to draw a distinct line between the two concepts because often traditional responsibility matters are incorporated into technical evaluation criteria used in negotiated procurements, and where an agency uses traditional responsibility criteria to

assess technical merit or acceptability, the technical evaluation may involve consideration of an offeror's capability as well as its proposed approach and resources.²⁷⁴

Nevertheless, the solicitation must advise offerors that traditional responsibility criteria will be *comparatively* evaluated.²⁷⁵

Examples of responsibility-type factors that have been used for *comparative* evaluation in source selection include (1) financial capability,²⁷⁶ (2) production capability,²⁷⁷ (3) facilities,²⁷⁸ (4) equipment,²⁷⁹ (5) staffing,²⁸⁰ (6) purchasing system,²⁸¹ (7) production techniques,²⁸² (8) delivery schedule,²⁸³ (9) schedule realism,²⁸⁴ (10) business practices,²⁸⁵ (11) safety,²⁸⁶ (12) spare parts availability,²⁸⁷ (13) knowledge of local law,²⁸⁸ and (14) warranty.²⁸⁹

Two responsibility factors are particularly troublesome. The first is "corporate experience." It causes problems because the evaluation sometimes is limited to the corporate entity²⁹⁰ while at other times it includes consideration of the corporation's officers and key personnel²⁹¹ and even subcontractors.²⁹² The second problematic responsibility factor is "risk." Solicitations sometimes delineate specific types of risk to be evaluated (e.g., management, operational, technical, cost, and performance).²⁹³ The Comptroller General holds, however, that risk is inherent in all evaluations of technical proposals.²⁹⁴ Therefore, evaluation of risk is permitted in the same procurement as a separate evaluation factor and as a consideration in evaluating other factors.²⁹⁵ Since "risk" has a negative value, another problem with this factor is how to evaluate the probability of negative events.²⁹⁶

The use of responsibility-type evaluation factors erodes competition and purchasing limitations by raising critical issues for both potential contractors and the Government. For potential vendors, the issue is "how much is enough?" Is this procurement worth the time, effort, and cost to compete? Will my financial resources, facilities, etc., be compared with those of General Motors, IBM, etc.? For the Government, an issue *should be* "how much is *too* much?" Will an offeror's \$50 million in financial resources justify paying a price premium for janitorial services when compared with a proposed contractor with only \$5 million in resources? There even may be a scale of points based on years of experience.²⁹⁷ The issue is not, however, how much the experience should be scored but how much is more than "enough." One proposal was rated superior partly because the offeror had 100 years of corporate experience.²⁹⁸ In addition, there always is the age-old question of whether the offeror had 10 years of experience or merely one year's experience 10 times. Competition is prejudiced because there is no statutory or regulatory guidance to limit the evaluation of responsibility factors to the amount or level that is *adequate* for the performance of the contract. As the Comptroller General said when a protester claimed its superior financial *condition* deserved a higher score:

The Navy did not rate [the protester's proposal] superior because, it explains, "it is hard to envision, let alone quantify, any added benefit to the agency resulting from massive revenues; [o]nce the financial condition and capability of an offeror is deemed to be sufficient to support performance of the contract, a rating of 'acceptable' is entirely appropriate."²⁹⁹

When the problem is raised, the Comptroller General points out that Congress has specifically recognized in 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) that responsibility-related factors, such as management capability and prior experience, are appropriate considerations in assessing the quality of proposals.³⁰⁰ However, these laws do not say the evaluation may be entirely subjective with no limitation to "adequacy."

Exceeding Government's Requirements

Another circumstance that has had an adverse effect on competition and government purchasing limitations is that evaluation points are awarded for *exceeding* the Government's requirements set forth in the solicitation. The practice sometimes is expressed as little more than a differentiation that awards a higher score to a proposal that exceeds the minimum requirements than to one that merely meets the requirements.³⁰¹ The "cafeteria selection" nature of this approach was described as follows:

We do not think that it is necessary or even practicable to assign specific weights in a solicitation to enhancements, the nature of which the agency cannot be aware of until they are actually proposed by an offeror. It is our view that such enhancements should be evaluated under the appropriate evaluation factor or subfactors in the solicitation and assigned the weight in the overall evaluation commensurate with the weight given to the factor or subfactor in the solicitation's evaluation scheme. Our view of the record indicates to us that this was done here.³⁰²

Solicitations sometimes advise competitors that their proposals will be given points for exceeding the requirements.³⁰³ In other cases, the Comptroller General has held that the mere fact that the solicitation provides for comparative judgments of technical evaluation criteria is notice that an agency may rate one offeror higher than others for exceeding the requirements.³⁰⁴ At other times, the source evaluation plan provides that points are earned only if a critical part exceeds the technical specifications.³⁰⁵ Occasionally, the Comptroller General will hold that it is improper to award higher points for exceeding the requirements.³⁰⁶ The practice is common, however, and examples of awarding higher scores for exceeding the solicitation requirements include performance capability,³⁰⁷ equipment,³⁰⁸ additional personnel,³⁰⁹ and organization and staffing.³¹⁰

Competitive evaluations that award points for exceeding the Government's requirements raise real questions as to whether there is genuine competition at all. It is difficult enough to compete to *meet* the requirements, but with undisclosed evaluation plans, undisclosed and subjective evaluation factors, etc., how can there be any meaningful competition to *exceed* the requirements? How much *more* than the requirements is *desired* (and will be awarded points)? In what areas are additional performance or capabilities desired? What will you be competing *against*? Finally, how can the Government justify paying a higher price for something that exceeds its actual needs as reflected by the specification requirements?

Best Value Procurements

The label "best value" procurement, although much in vogue today, neither broadens nor narrows the discretion agencies always have exercised in conducting cost/technical tradeoffs.³¹¹ The practice sometimes is called "greatest value."³¹² Essentially, it merely means that there is no requirement that the contract be awarded based on the low price,³¹³ and this subject could constitute a completely separate topic for discussion.³¹⁴ The evaluation may be based on dividing the technical evaluation point score by the total proposed price to obtain a price/quality ratio.³¹⁵ This practice was a standard technique used in the Navy's technical evaluation manual for turnkey family housing at least as early as 1975.³¹⁶ Another "best value" evaluation factor also much in vogue today is "past performance." This topic also is too broad to cover here³¹⁷ and has many inherent problems, risks, and effects on competition, but the method expressly contemplates the possibility of paying a price premium based on evaluation of the types of factors previously discussed in this article.

The only illustration of the potential impact of this method on competition and purchasing limitations will be a hypothetical example of a solicitation by the General Services Administration for automobiles for the GSA motor pool. If the solicitation were issued on a "best value" basis with "technical" (defined as engineering, appearance, comfort, and warranty) rated 70% and cost 30%, it is possible that a Cadillac could win over a Ford or Chevrolet. This result would not mean, however, that the Government actually *needs* this higher cost transportation.

Impact on Small Business Concerns

One of the most serious erosions of competition (and perhaps the most subtle) has been the adverse impact of current procurement practices on small business concerns and minority enterprises. No small business concern may be precluded from award because of *nonresponsibility* without referral of the matter to the Small Business Administration (SBA) for a final determination (and possible issuance of a certificate of competency).³¹⁸ Application of responsibility-type evaluation factors on a pass/fail or go/no go basis that results in the elimination of a small business concern from competition without referral of

the matter to the SBA is improper.³¹⁹ However, a proposal from a small business concern *may* be rejected as unacceptable based on a *relative* assessment of responsibility-type factors *without* a referral to the SBA.³²⁰

It is relatively easy, therefore, to eliminate small business concerns from competition merely by including responsibility-type evaluation factors in the solicitation and then comparing the small business concern's capabilities with much larger, more experienced companies (even if the greater capabilities or resources of the large businesses exceed the Government's actual needs). Examples of the *comparative evaluations* of responsibility-type factors that have resulted in small business concerns and minority enterprises being eliminated from competition for government contracts include (a) corporate experience,³²¹ (b) corporate resources,³²² (c) management capability,³²³ (d) production capability,³²⁴ (e) staffing for cost tracking and control,³²⁵ (f) personnel experience,³²⁶ (g) personnel qualifications,³²⁷ (h) demonstrated expertise and capability,³²⁸ and (i) management and staffing.³²⁹ It is essential to note that, in *not one* of these decided cases was a determination made that the small business concern was not capable of performing the contract satisfactorily. The effect of the decisions is merely that someone else was rated to be *more* capable.

In a somewhat surprising recent development, agencies actually have been instructed how to structure solicitations to avoid referrals to the SBA. The recent *Guide to Best Practices for Past Performance* issued by the Office of Federal Procurement Policy (Interim ed. May 1995) states at page 12:

To make clear from the outset that past performance is being used as an evaluation factor, it should be included in the solicitation as a factor against which offerors' relative rankings will be compared. Agencies should avoid characterizing it as a minimum mandatory requirement in the solicitation. When used in this fashion — to make a "go/no go" decision as opposed to making comparisons among competing firms — it will be considered part of the responsibility determination. As such, it will be subject to review by the Small Business Administration under the Certificate of Competency process.

The effective elimination of small business concerns from competition excludes numerous qualified competitors and creates a subtle restriction on competition to larger, over-qualified competitors without justifying that such a restriction is necessary to meet the Government's actual needs. Responsibility-type evaluation factors also favor the large businesses that *already have* the facilities, financial resources, etc., over the small business concerns that only have the "ability to obtain" them, as permitted under responsibility determinations.³³⁰

Congress has had problems for many years requiring government agencies to contract with small business concerns. In a memorandum for the Secretary of Defense dated February 6, 1961, President John F. Kennedy said:

I note that Congress has once again criticized the Department of Defense for not giving more contracts to small business. This is an old complaint. I think it would be useful for you to have someone look into exactly how this is handled and whether it is possible for the Defense Department to put more emphasis on small business. If it isn't possible for us to do better than has been done in the past I think we should know about it. If it is possible for us to do better we should go ahead with it and I think we should make some public statements on it. Would you let me know about this?³³¹

The most discouraging aspect of this problem is not that small business firms do not get the contracts but, rather, that the taxpayers are deprived of the benefit of the lower prices that presumably would result from their competition in the contracting process.

The Minimum Needs Doctrine

For over 100 years, one of the most significant restraints on government purchasing has been the so-called "minimum needs" doctrine. The restraint is grounded in the basic authority of the Government to make any purchases or contracts. All contracting authority of the Government must be derived from one of two possible sources; namely, (1) a statute expressly authorizing a contract to be made (a contract authorization act, which is rarely used), or (2) an appropriation of funds from which the authority to contract can be *implied* (which accounts for over 99% of all government purchases). This rule was explained in an 1897 decision of the Comptroller of the Treasury as being based on Section 3732 of the Revised Statutes, which stated that no contract or purchase could be made unless the same is authorized by law or is under an appropriation adequate for its fulfillment.³³² However, the *implied* authority extends only to expenditures which are necessary or incident to the purpose of the appropriation.³³³ The theory is that it cannot be *implied* that Congress *intended* to confer authority to contract for more than the Government's *needs*. Indeed, the principle of law is that "a legal contract cannot be made now for articles the Government does not need."³³⁴ This rule, therefore, was expressed as providing that the Government can only buy what it actually *needs*, not what it wants or *desires*.³³⁵

The rule was stated by the Comptroller General as follows:

It has long been the rule, enforced uniformly by the accounting officers and the courts, that an appropriation of public moneys by the Congress, made in general terms, is available only to accomplish the particular thing authorized by the appropriation to be done.

It is equally well established that public moneys so appropriated are available only for *uses reasonably and clearly necessary to the accomplishment of the thing authorized by the appropriation to be done.*³³⁶

(Emphasis added.) There also is no authority, under the doctrine, to include any provision in government contracts that is not *essential* to the accomplishment of the purpose of the appropriation under which the contract was made.³³⁷ The Government's "needs" were required to be obtained at the "most reasonable prices obtainable."³³⁸ Applying the doctrine, the Comptroller General held that requirements for automobiles with leatherette upholstery³³⁹ and four camshaft bearings³⁴⁰ exceeded the Government's minimum needs.

There still is an Anti-Deficiency Act,³⁴¹ which provides that an officer or employee of the Government cannot make contracts before an appropriation is made unless authorized by law. Without a contract authorization act, the Government's authority to contract is still *implied* from the appropriation. The limitation to contracting only for the Government's *minimum* needs is included in the procurement regulations.³⁴² A contracting officer was quoted in one bid protest decision as referring to the "old adage" that the Government drives Chevrolets, not Cadillacs.³⁴³

The failure to apply the minimum needs doctrine has led to sharply reduced competition and erosion of the historical purchasing limitation. How has this occurred? The primary reason is that there is no effective way to "police" the limitation. The Comptroller General consistently holds that the contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs.³⁴⁴ This is described as *broad* discretion.³⁴⁵ It is virtually impossible to challenge an agency's determination of its minimum needs in a bid protest environment. This has led to anticompetitive practices of undisclosed evaluation plans, undisclosed evaluation factors, proposals exceeding the solicitation's requirements, and comparative evaluation of responsibility factors. Failure to enforce the rule permits the Government to require services exceeding the standards in the private sector, such as a two-hour response time for Air Force housing for breakdown of air conditioning,³⁴⁶ and clean shirts and pants every other day, personally tailored to the individual employee.³⁴⁷ Congress should consider these circumstances in connection with any proposed reduction in competition requirements.

Source Selection

The source selection process also undermines competition in contracting by the absence of rules, effective standards, or practical enforcement. The process begins with the agency's source selection *plan*. As discussed above, agencies are not required to *disclose* the evaluation plan to competitors. In addition, the agencies are not *bound* by their own source evaluation plan because the plans are internal agency instructions and,

as such, do not give outside parties any rights.³⁴⁸ Even when the evaluation plan stated the evaluation would be performed by a "team" but actually was done by the chairman alone, the Comptroller General held there was no basis for questioning the award.³⁴⁹ The qualifications of the evaluators also are not subject to challenge (absent fraud, bias, or conflict of interest) because their selection is within the discretion of the agency.³⁵⁰ One decision stated:

We observe that even if protester were able to establish with a preponderance of the evidence that the evaluators harbored a hidden favoritism towards Integraph, that alone would provide no basis for sustaining a protest at this time. We are all to some extent the product of our experiences and that alone hardly should be a sufficient basis for finding prejudice. So long as the evaluators are knowledgeable and professionally qualified — there is no allegation to the contrary — and fairly conduct their evaluations in accordance with valid criteria provided to them, it is irrelevant that circumstances beyond their control have provided them with a preponderance of experience with the equipment of one competitor.³⁵¹

Challenges to the technical *qualifications* of evaluators will not be considered,³⁵² even when non-doctors were evaluating physicians.³⁵³ In fact, the entire composition of the evaluation panel is within the agency's discretion.³⁵⁴ The Comptroller General also recognizes that the individual evaluators have "disparate, subjective judgments on the relative strengths and weaknesses of a proposal,"³⁵⁵ but this does not indicate that the evaluation was flawed.³⁵⁶ The evaluators' point scores are not binding on the source selection official;³⁵⁷ they are "merely aids for selection officials."³⁵⁸ Even the scoring *method* in the evaluation plan is not binding on the source selection official.³⁵⁹

Source selection officials have "wide discretion" and are bound neither by the technical scores nor the source selection recommendations of the technical evaluators.³⁶⁰ They have "broad discretion" in determining the manner and extent to which they will make use of technical and cost information and are subject "only to the tests of rationality and consistency with the established evaluation factors."³⁶¹ This means they are not bound even by the conclusions of the technical experts.³⁶²

The risk of this almost absolute discretion (subject only to consistency with the disclosed factors in the RFP, fraud, etc.)³⁶³ is that there is no real "competition" when rules are neither *disclosed* nor *followed*. It is hard to defend this process as true "competition" when the rules are not disclosed, are applied secretly, and are not binding when decisions are challenged. Source selection is an excellent example of where a bad rule may be better than no rule. As stated in one decision, the source selection authority was "proud to be known throughout the Defense Department for 'going by the book,' but apparently the book he goes by is not the FAR."³⁶⁴ The mischief that can occur under this

process could not be illustrated better than by the recent decision of the Eleventh Circuit in *Latecoere International, Inc. v. United States*³⁶⁵ describing the "cheating" and "cooking the books" that had occurred in the improperly motivated manipulation of the evaluation ratings even though a bid protest previously had been denied by the Comptroller General.

Bid Protests

The general scope, benefits, and shortcomings of the bid protest system are beyond the scope of these remarks. The point will be made only briefly that the bid protest system cannot *establish* effective rules of competition and, under the current rules, cannot *enforce* effective rules of competition. The discretion granted to agencies in the selection process precludes an effective policing system. The Comptroller General, for example, generally reviews agency decisions in the source selection process only to see if they have any reasonable basis and are consistent with the solicitation. This standard of review applies to determining requirements,³⁶⁶ minimum needs,³⁶⁷ evaluation of proposals,³⁶⁸ cost/technical tradeoffs,³⁶⁹ the source selection decision,³⁷⁰ and conflicts of interest.³⁷¹

The Comptroller General's standards of review are even more difficult to overcome in decisions involving other issues, like composition of the evaluation board (requiring fraud, bad faith, conflict of interest, or actual bias),³⁷² bias (requiring convincing evidence of specific and malicious intent to injure the protester),³⁷³ and bad faith (requiring virtually irrefutable evidence that the agency had specific and malicious intent to injure the protester).³⁷⁴

The standard of review of the GSBICA in bid protest cases is broader because its review is *de novo*.³⁷⁵ The GSBICA applies the same standard as it does to contracting officers' decisions under contract disputes procedures.³⁷⁶ It will review information that was not available to the contracting officer.³⁷⁷ Nevertheless, the Board has consistently held that, where the solicitation does not set forth specific weights to be applied in conducting cost/technical tradeoffs, agencies are accorded "great discretion" in determining which proposal is most advantageous to the Government.³⁷⁸ Reviewing courts also recognize that contracting officers are entitled to exercise discretion upon a broad range of issues in source selection.³⁷⁹ The point of this brief discussion is that the major problems in the eroding competition and purchasing limitations are more fundamental than can be solved merely by modifications to the bid protest system. Congress must prescribe (or require agencies to prescribe) the rules, standards, and practices to obtain true "competition."

Proposals to Limit Competition Requirements

Procurement Reform

There are several "procurement reform" proposals pending in Congress that would limit full and open competition. The current procurement reform proposals are directed toward having the Government adopt some of the purchasing practices used in the commercial marketplace. This reform movement began with Vice President Gore's *Report of the National Performance Review* issued on September 7, 1993.³⁸⁰ The Report said that the Government frequently purchases low-quality items, or even wrong items, that arrive too late or not at all. The Report concluded by saying that federal managers can buy 90% of what they need over the phone, from mail-order discounters.

The Administration's point person on this reform is Steven Kelman, Administrator of the Office of Federal Procurement Policy. Mr. Kelman was professor of public policy at Harvard University before his appointment to his current position. His views were expressed succinctly in his book, *Procurement and Public Management*, published before he took his current position.

I, too, believe that the government often fails to get the most it can from its vendors. In contrast to the conventional view, however, I believe that the system of competition as it is typically envisioned and the controls against favoritism and corruption as they typically occur are more often the source of the problem than the solution to it. The problem with the current system is that public officials cannot use common sense and good judgment in ways that would promote better vendor performance. I believe that the system should be significantly deregulated to allow public officials greater discretion. I believe that the ability to exercise discretion would allow government to gain greater value from procurement.³⁸¹

In view of the discussion in the previous sections of these comments, it is respectfully suggested that "common sense and good judgment" are uniformly permitted and upheld in the competitive source selection phase of government contracts and that many more procurement problems in source selection have been *caused* by the discretion public officials have exercised than by the *lack* of discretion.

The Federal Acquisition Streamlining Act of 1994³⁸² (FASA) states, in § 1091, that an offeror's past performance should be considered in awarding a contract and requires the OFPP to establish policies and procedures for this purpose. The OFPP recently published its "Best Practices" guide for past performance.³⁸³ This guide states that one of the major factors to be evaluated is customer (*i.e.*, government) satisfaction, which measures the "contractor's customer relations efforts" and "how well the contractor

worked with the contracting officer."³⁸⁴ This "improvement" and procurement reform, if not more carefully defined and used, could have an undesired impact on competition in contracting. One solicitation involved in a decision last year described past performance as including the offeror's *reputation* for reasonable and cooperative behavior.³⁸⁵ In another decision, the references stated the protester was "difficult to work with" even though the protester contended it was being penalized principally for filing legitimate claims.³⁸⁶ In a third case, the protester was downgraded for past performance based in part on a reference who stated he would not choose to contract with the protester again because "he found the negotiation of modifications with the protester to be difficult."³⁸⁷ Do these cases suggest contractors will be downgraded for utilizing the remedies provided in standard government contract clauses? If so, there may be a short-term benefit to the Government, but the supply of potential vendors will eventually dwindle, to the detriment of competition.

The Competition Standard

A legislative proposal introduced in the House of Representatives on May 18, 1995, H.R. 1670,³⁸⁸ would have changed the CICA "full and open competition" standard to one of "maximum practicable competition." The proposal would have defined "maximum practicable competition" to mean that "a maximum number of responsible or verified sources (consistent with the particular Government requirement) are permitted to submit sealed bids or competitive proposals on the procurement."³⁸⁹ The sponsors' analysis of the bill explained this change as follows:

Subsection (a) would amend 10 USC 2304(a) governing armed services acquisitions to establish a new standard of competition for the acquisition of goods and services - "maximum practicable" competition. This would replace the current requirement that all sources be given the "right" to be considered for government contracts whether or not the source has a realistic chance of supplying goods or services of the requisite quality at a reasonable price. The new standard would permit the government to focus on a meaningful competition among sources who can meet or exceed the government's requirements. In order to parallel the new competition standard the subsection would also amend 10 USC 2304(g)(3) which sets forth the standard for the use of competition in the simplified procedures for acquisitions under the simplified acquisition threshold to provide that agencies obtain competition to the "extent practicable" consistent with the particular requirement solicited.

There was no explanation in the analysis of what "a maximum number" of sources would be, what standards would be used to determine that number, and how the determination

would be made. It was rather obvious that a "maximum" number translated to a "limited" number, but what would have been the permissible limits?

A summary of the bill said that the Government no longer can afford competition for the sake of competition.³⁹⁰ As discussed above, this never was a purpose of competition, and limiting competitors no doubt will reduce the opportunity for the cost savings competition is presumed to obtain. Moreover, in view of the myriad permissible restrictions on competition currently available, one questions the desirability and even the necessity of additional legal authority to restrict competition.

A proposed amendment to the Fiscal Year 1996 National Defense Authorization Act offered during floor debate in the House of Representatives June 14, 1995, would have incorporated most of the provisions of H.R. 1670, including the change to "maximum practicable competition."³⁹¹ The DOD Inspector General opposed the proposed change in the competition standard.³⁹² However, an amendment to the proposed amendment superseded the proposed change and preserved the "full and open competition standard." The vote was 213 to 207, with 14 members not voting.³⁹³

Another amendment to the defense bill adopted June 14 would require solicitations to include:

a description, in as much detail as is practicable, of the source selection plan of the agency, or a notice that such plan is available upon request.³⁹⁴

The sponsor of this amendment stated that, if companies are better informed about how offers will be evaluated, they will be better able to give the Government "exactly what it needs and at the best price."³⁹⁵

The July 27, 1995, markup of H.R. 1670 by the House Committee on Government Reform and Oversight deleted the "maximum practical competition" standard and now provides in Section 101(a) and (b) that federal agencies:

(A) shall obtain full and open competition —

"(i) that provides open access, and

"(ii) that is consistent with the need to efficiently fulfill the Government's Requirements, through the use of competitive procedures in accordance with this chapter and the Federal Acquisition Regulation; and

(B) shall use the competitive procedure or combination of competitive procedures that is best suited under the circumstances of the procurement.

Section 102(a) of the H.R. 1670 markup provides:

(5) The term "competitive procedures" means procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to *efficiently* fulfill the Government's requirements.

(6) The term "open access," when used with respect to a procurement, means that all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement.

(Emphasis added.) The key provision, of course, authorizes limitations or restrictions to be included in competitive procedures in order to fulfill the Government's requirements "efficiently." Anyone who is not worried about the implementation of such provisions in the procurement regulations should study the chaos and unnecessary costs caused by a poorly-drafted definition of "claim," compounded by erroneous interpretations of the regulation, as discussed in the very recent *en banc* decision of the Court of Appeals for the Federal Circuit in *Reflectone, Inc. v. Dalton*.³⁹⁶

The Competitive Range for Discussions

The "competitive range" refers to the proposals of offerors selected by the contracting officer for written or oral discussions.³⁹⁷ A proposal in the administration's pending acquisition reform legislation, the Federal Acquisition Improvement Act of 1995³⁹⁸ (H.R. 1388, S. 669), would authorize limitations to be placed on the number of offerors in the competitive range. Sections 1012 and 1062 provide:

If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of offerors in the competitive range to the greatest number of competitors that will permit an efficient award; provided that when the competition is limited for this purpose, the number of offerors may not be limited to less than three.

The bill analysis explained this provision as follows:

This section would allow agencies to limit the number of offerors in the competitive range to no more than three when the

contracting officer determines that such action would provide for efficiently making an award. After initially evaluating each offeror's proposal, agencies now, according to General Accounting Office (GAO) and General Services Administration Board of Contract Appeals (GSBCA) decisions, must look for the "natural break" in making a competitive range determination. If there is any question as to whether an offeror should be included in the competitive range, the offeror is kept in the competitive range. The result is that agencies generally will not leave any offeror out of the competitive range unless that offeror clearly has no chance whatsoever of being awarded the contract.

This section would allow agencies to limit the number of offerors in the competitive range to three when the contracting officer determines that it is warranted by considerations of efficiency. In addition to enabling agencies to expedite the procurement process, limiting the size of the competitive range will allow offerors that do not have a real chance of receiving award to save time and money by being removed sooner rather than later.³⁹⁹

The immediate question raised by this provision is "What is efficient competition?" The next question is "Why is the provision necessary?"

The competitive range currently is defined to include "all proposals that have a reasonable chance of being selected for award."⁴⁰⁰ The Comptroller General has held consistently that the determination of whether a proposal is within the competitive range is primarily within the contracting officer's *discretion* and will not be disturbed unless it was *unreasonable*.⁴⁰¹ The GSBCA also has said that the contracting officer has "broad discretion" in determining the competitive range, and the decision will not be disturbed unless it is "clearly unreasonable."⁴⁰² Thus, both the GAO and GSBCA review only for "reasonableness." Contracting officers' determinations of which proposals have a reasonable chance for award may be based on their "relative" standing to other proposals.⁴⁰³ These determinations are really subjected to close scrutiny *only* where the result is a competitive range of *one*.⁴⁰⁴ Even determinations resulting in a competitive range of *one* will not be disturbed in the absence of a clear showing that they were unreasonable.⁴⁰⁵

With the contracting officer's broad discretion recognized by both the Comptroller General and the GSBCA, and the "test" applied being only "reasonableness," why would a contracting officer *want* to exclude offerors that have a *reasonable chance* for award? When competitive ranges of "one" are routinely approved (albeit after "close scrutiny"), why is statutory authority to limit the number to "three" deemed necessary? It is difficult to see how "efficiency" could outweigh the benefits of competition.

An alternative approach is contained in an amendment to the defense bill adopted by the House June 14, which provides:

With respect to competitive proposals, the head of the agency may make a preliminary assessment of a proposal received, rather than a complete evaluation of the proposal and may eliminate the proposal from further consideration if the head of the agency determines the proposal has no chance for contract award.⁴⁰⁶

This provision would merely reflect an early exclusion from the competitive range and, essentially, would only confirm authority already exercised by contracting officers.⁴⁰⁷

Conclusion

Most of our problems of "efficiency" in acquisitions are not caused by competition but by the lack of competition (or poor quality of competition). When the goals or "requirements" are ambiguous, when there are *no* rules or the rules are not *disclosed*, and when selections are made based on vague, indefinite, and subjective standards, protests can be expected, and potential competitors are lost. Indeed, the public and taxpayers are fortunate that the bid protest system provides a vehicle to expose the problems and serve as a protection against favoritism, excessive requirements, and other mischief. There is no more efficient way to "police" the procurement system than to have it done by the competitors themselves. They know the requirements, they know the government technical and contracts representatives, and they know each other. An army of auditors or inspectors general could not possibly perform "compliance reviews" as effectively as the bid protest system operates.

If Congress wants to make meaningful procurement reforms and reduce acquisition costs, attention should be directed toward *improving*, not *reducing*, competition. Training should be provided for those who *plan* for requirements and *define* the Government's needs in specifications and statements of work (which serve as the baseline for evaluating proposals). Standard evaluation factors, as objective as possible, should be established with required criteria for their application. Training should be provided for government technical personnel who evaluate proposals. Agencies should be required to recognize (or at least accept) that disclosing selection plans (and evaluation factors) and conducting source selections in the "purifying" sunlight will result in lower costs and fewer delays. Standards should be established for procurement officials, and those who are unwilling to accept the obligations of competition in source selection should be replaced. The monetary value of competition should be apparent from the Government's own studies cited earlier in this article.⁴⁰⁸ If there is any remaining doubt regarding the benefits of competition, Congress should require all agencies to report each year all "competitive" awards that were not made to the offeror in the competitive range with the lowest price (and the amount of the difference). This should not be difficult, because, if a proposal did

not have a reasonable chance of being selected, it should have been excluded from the competitive range determination.

The proposals under consideration today will reduce the competition requirements under the guise of efficiency and of affording more flexibility and discretion to contracting officials. This efficiency, flexibility, and discretion will result in the "rules" of competition becoming even more vague and ambiguous. It is interesting that the lack of "rules" has led to litigation in recent years in recreational sports, such as softball, touch football, and "pickup" basketball. In one softball game, a runner slid into home plate and injured the catcher.

From that single play grew a six-year court battle that raised some unusual questions: Is sliding fair play? Is there a difference between "plowing" and "barreling" into another player? And what exactly did Ty Cobb mean when he said "the baseline belongs to the base runner?"⁴⁰⁹

Competition for government contracts is not a sport — it is a costly and serious business — but the problems of indefinite rules are applicable to both types of competition. *Reducing the "rules" may well reduce competition itself.* Each decision affecting the rules of competition affects the quality of competition. The lower the quality of competition, the more incidents of favoritism, collusion, fraud, and unnecessary expenditures can be expected. Before proposed "reforms" and "improvements" are embraced, careful attention should be paid to the fundamental rules of competition on which our procurement system has operated for nearly two centuries. We should look *backward* to the reasons for our traditional rules and *forward* to the impact and possible consequences of change.

There are even *contractors* who support reducing the rules of competition. They often do so, however, because they do not like, or will not accept, the "baggage" of government contract terms and conditions (which are not related to "competition"). These contractors should recall the colloquy between Sir Thomas More and Master Roper in the play, *A Man For All Seasons*,⁴¹⁰ in which Roper is shocked that More would give the Devil the benefit of the law (which More said he would do for his own safety's sake). That colloquy is paraphrased (very loosely) below, with More now in the role of a government contractor.

Roper:

Would you want even your competitors to have the benefit of the rules of competition?

More:

Yes! What would *you* do? Cut a great road through the rules to obtain your government contracts?

Roper:

I'd cut down every procurement rule in the country to get my contracts.

More:

Oh? And when the last rule is gone and your competitors become the Government's favored suppliers, how could you get contracts then with all the rules eliminated?

Our procurement system is planted thick with rules. If you cut out the rules, do you really think you would have a chance of getting government contracts if you had no protection from arbitrary government action, undisclosed requirements, restrictive specifications, favoritism, political influences, inside information, conflicts of interest, and even fraud?

Yes, I want to keep the competition rules for my own business' sake.

Endnotes

¹ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).

² *United States v. New York & Porto Rico Steamship Co.*, 239 U.S. 88, 93 (1915).

³ *Ellis v. United States*, 206 U.S. 246, 256 (1907).

⁴ H.R. Rep. No. 1157, 98th Cong., 2d Sess. 18 (1984), *quoted in Project Software & Development, Inc.*, GSBICA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,413.

⁵ Senate Committee on Government Affairs, S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code Cong. & Admin. News 2174-5. This view was also recently expressed in a letter dated June 13, 1995, from the Department of Defense Inspector General to Congressman William F. Clinger, Jr., 141 *Cong. Rec.* H5926 (daily ed. June 14, 1995).

⁶ *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).

⁷ *J. L. Manta, Inc. v. Braun*, 376 N.W.2d 466 (Minn. Ct. App. 1985); *accord Sierrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951).

⁸ *L & R Rail Service*, B-256341, June 10, 1994, 94-1 CPD ¶ 356 at 3.

⁹ Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (1984).

¹⁰ *Allfast Fastening Systems, Inc.*, B-251315, 93-1 CPD ¶ 266 (n.3 at 6).

¹¹ Statement of Thomas D. Morris, Assistant Secretary of Defense (Installations and Logistics), Sept. 2, 1962, to the Select Committee on Small Business, *The Role of Small Business in Government Procurement—1962-1963*, Hearings Before the Select Committee on Small Business 5, 87th Cong., 2d Sess. (Sept. 12, 1962).

¹² Background Material on Economic Aspects of Military Procurement and Supply, Joint Economic Committee of the Congress of the United States at 69, 88th Cong., 1st Sess. (1963).

¹³ *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503 at 4.

¹⁴ S. Rep. No. 98-50, note 5, *supra* at 2176.

¹⁵ *Id.*

¹⁶ 1 Report of the Commission on Government Procurement 163-64 (Dec. 31, 1972).

¹⁷ 2 Stat. 536 (1809).

¹⁸ Sec. 10 of Act of March 2, 1861, 12 Stat. 214, 220.

¹⁹ Revised Statutes of the United States § 3709 (1873-1874).

²⁰ 18 Comp. Gen. 285, 293 (1938); 10 Comp. Gen. 294, 301 (1931).

²¹ 20 Comp. Gen. 903, 907 (1941); *See* 17 Comp. Gen. 789 (1938) ("free and open").

²² 32 Comp. Gen. 384 (1953).

²³ *Quoted in* Nash & Cibinic, *Federal Procurement Law* 222, 230 (George Washington Univ., 2d ed. 1969).

²⁴ Title II of the First War Power Act, 55 Stat. 839 (1941).

²⁵ Letter dated January 13, 1947, from Acting Secretary of the Navy to the Speaker of the House of Representatives, *included in* S. Rep. No. 571 (July 16, 1947), 2 U.S. Code Cong. Serv. 1048, 1075, 80th Cong., 2d Sess. (1948).

²⁶ 62 Stat. 21 (Feb. 19, 1948).

²⁷ *Id.*

²⁸ 70A Stat. 130 (1956).

²⁹ Letter dated Jan. 17, 1947, from Secretary of War to the Speaker of the House of Representatives *included in* S. Rep. No. 571, note 25, *supra*.

³⁰ S. Rep. No. 571 at 1, note 25, *supra*.

³¹ 63 Stat. 377, 395 (June 30, 1949).

³² S. Rep. No. 98-50 at 5, note 5, *supra*.

³³ *Id.* at 9.

³⁴ *Id.* at 17.

³⁵ CICA § 2711(a)(1), note 9, *supra*; 41 U.S.C. § 253.

³⁶ CICA § 2723(b), note 9, *supra*; 10 U.S.C. § 2305.

³⁷ 10 U.S.C. § 2305(a)(1)(B)(ii); 41 U.S.C. § 253a(a)(2)(B).

³⁸ Conference Report on the Deficit Reduction Act of 1984, H.R. Rep. No. 98-861, 98th Cong., 2d Sess. at 1429 (1984), 1984 U.S. Code Cong. & Admin. News 2117.

³⁹ *Id.* at 1422.

⁴⁰ *Id.* See *James LaMantia*, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574 at 2-3.

⁴¹ Section 2731 of CICA amended the Office of Federal Procurement Policy Act, 41 U.S.C. § 403, to add these definitions.

⁴² 41 U.S.C. § 418.

⁴³ *Businessland, Inc.*, GSBGA No. 8586-P-R, 86-3 BCA ¶ 19,288 at 97,513.

⁴⁴ 10 U.S.C. § 2304(c)(1); 41 U.S.C. § 253(c)(1); FAR § 6.302-1.

⁴⁵ *Id.* See *Ames-Avon Indus.*, B-227839.3, July 20, 1987, 87-2 CPD ¶ 71.

⁴⁶ FAR § 6.302-1(a)(2).

⁴⁷ 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 253(c)(2); FAR § 6.302-2.

⁴⁸ 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).

⁴⁹ *Honeycomb Co.*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209.

⁵⁰ *IMR Systems Corp.*, B-222465, July 7, 1986, 86-2 CPD ¶ 36.

⁵¹ 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 253(c)(3); FAR § 6.302-3. *See Proper International, Inc.*, B-229888, Mar. 22, 1988, 88-1 CPD ¶ 296.

⁵² 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR § 6.302-4.

⁵³ *Kahn Indus., Inc.*, B-225491, Mar. 26, 1987, 87-1 CPD ¶ 343. *See Group Technologies Corp.*, B-250699, Feb. 17, 1993, 93-1 CPD ¶ 150.

⁵⁴ 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 253(c)(5); FAR § 6.302-5.

⁵⁵ FAR § 6.302-5.

⁵⁶ 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR § 6.302-6.

⁵⁷ *Federal Labs Systems*, B-224258, Feb. 4, 1987, 87-1 CPD ¶ 111.

⁵⁸ 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 253(c)(7); FAR § 6.302-7.

⁵⁹ *Acumenics Research & Technology, Inc.*, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128.

⁶⁰ 10 U.S.C. § 2304(g); 41 U.S.C. § 253(g). *See Omni Elevator Co.*, B-246393, Mar. 6, 1992, 92-1 CPD ¶ 264; *see also Helitune, Inc.*, B-243617.2, Mar. 16, 1992, 92-1 CPD ¶ 285.

⁶¹ *Tecom Industries, Inc.*, B-236371, Dec. 5, 1989, 89-2 CPD ¶ 516.

⁶² S. Rep. No. 571, 2 U.S. Code Cong. Serv. 1048, 1064, 80th Cong., 2d Sess. (1948); H.R. Rep. No. 670, 2 U.S. Code Cong. Serv. 1475, 1498, 81st Cong., 1st Sess. (1949).

⁶³ FAR Part 14.

⁶⁴ FAR Part 15.

⁶⁵ S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code & Admin. News 2174, 2191.

⁶⁶ Note 40, *supra*, and accompanying text.

⁶⁷ Note 38, *supra*, and accompanying text.

⁶⁸ Source selection procedures are designed to "maximize competition." FAR § 15.603(a).

⁶⁹ *CRC Systems, Inc.*, GSBCA No. 9385-P, 88-2 BCA ¶ 20,665 at 104,436; *NUS Corp.*, B-221863, June 20, 1986, 86-1 CPD ¶ 574; *Descomp, Inc.*, B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.

⁷⁰ *Military Waste Management, Inc.*, B-240769.3, Feb. 7, 1991, 91-1 CPD ¶ 135.

⁷¹ *DSI, Inc.*, GSBCA No. 8568-P, 87-1 BCA ¶ 19,407.

⁷² Note 37, *supra*.

⁷³ *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266 at 5; *Pacific Scientific Co.*, B-231175, Aug. 30, 1988, 88-2 CPD ¶ 193.

⁷⁴ See, e.g., *James LaMantia*, B-245287; Dec. 23, 1991, 91-2 CPD ¶ 574; *Kahr Bearing*, B-228550.2, Feb. 25, 1988, 88-1 CPD ¶ 192; *Packaging Corp.*, B-225823, July 20, 1987, 87-2 CPD ¶ 65.

⁷⁵ *Trimble Navigation, Ltd.*, B-247913, July 13, 1992, 92-2 CPD ¶ 17.

⁷⁶ 41 U.S.C. § 403(7)(B); *Transtar Aerospace, Inc.*, B-239467, Aug. 16, 1990, 90-2 CPD ¶ 134.

⁷⁷ *Old Dominion Security*, ASBCA No. 40062, 91-3 BCA ¶ 24,173 at 120,918.

⁷⁸ *North American Reporting, Inc.*, B-198448, Nov. 18, 1980, 80-2 CPD ¶ 364.

⁷⁹ 39 Comp. Gen. 570 (1960). *Accord* 51 Comp. Gen. 518 (1972) (solicitation permitting deviations from specifications do not "generally" permit free and equal competitive bidding).

⁸⁰ 10 U.S.C. § 2305(a)(1)(A)(i) and (B)(i); 41 U.S.C. § 253a(a)(1)(A) and (2)(B).

⁸¹ *Adventure Tech, Inc.*, B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202.

⁸² *Bishop Contractors, Inc.*, B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555; n.2 at 3.

⁸³ *CPT Corp.*, GSBCA No. 8134-P-R, Jan. 28, 1986, 86-1 BCA ¶ 18,727 at 94,239.

⁸⁴ *Container Products Corp.*, B-255883, April 13, 1994, 94-1 CPD ¶ 255.

⁸⁵ 10 U.S.C. § 2305(b)(1); 41 U.S.C. § 253b(a).

⁸⁶ *Aydin Corp.*, B-227817, Sept. 28, 1987, 87-2 CPD ¶ 306.

⁸⁷ *Resource Consultants, Inc.*, GSBCA No. 8342-P, April 17, 1986, 86-2 BCA ¶ 18,942 at 95,677.

⁸⁸ 10 U.S.C. § 2305(a)(2); 41 U.S.C. § 253a(b).

⁸⁹ Pub. L. No. 103-355 (Oct. 13, 1994), 108 Stat. 3243, §§ 1011 and 1061.

⁹⁰ 10 U.S.C. § 2305(b); 41 U.S.C. § 253b(c) and (d).

⁹¹ *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.

⁹² *Professional Data Systems*, GSBCA No. 8475-P, 86-3 BCA ¶ 19,083 at 96,422.

⁹³ *Abel Converting Co.*, B-229065, Jan. 15, 1988, 88-1 CPD ¶ 40.

⁹⁴ *Uniform Rental Services*, B-228293, Dec. 9, 1987, 87-2 CPD ¶ 571. *Accord Abel Converting Co.*, note 93, *supra*.

⁹⁵ *W. H. Smith Hardware Co.—Recon.*, B-222045.2, July 1, 1986, 86-2 CPD ¶ 1.

⁹⁶ *Cycad Corp.*, B-255870, April 12, 1994, 94-1 CPD ¶ 253; *Engine & Generator Rebuilders*, B-220157, Jan. 13, 1986, 86-1 CPD ¶ 27.

⁹⁷ *Julie Research Laboratories, Inc.*, GSBCA No. 9474-P, 88-3 BCA ¶ 20,966 at 105,954-55. The Comptroller General also expressed this view, saying: "it would seem that necessarily all specifications are restrictive in the sense that the requirements they establish, whether reasonable or not, preclude the purchase of nonconforming items" Unpub. Comp. Gen. B-168278 (Mar. 30, 1970).

⁹⁸ 1 Comp. Dec. 363, 364 (April 10, 1895).

⁹⁹ *Harbor Branch Oceanographic Institution, Inc.*, B-243417, July 17, 1991, 91-2 CPD ¶ 67.

¹⁰⁰ *ViON Corp.*, B-256363, June 15, 1994, 94-1 CPD ¶ 373. In this case, the Comptroller General held that the language of the specification did not express the agency's minimum needs and was "overly restrictive."

¹⁰¹ *Science Pump Corp.*, B-255803, April 4, 1994, 94-1 CPD ¶ 227.

¹⁰² *Integrated Systems Group, Inc. v. Department of the Army*, GSBCA No. 12417-P, 94-1 BCA ¶ 26,273 at 130,716.

¹⁰³ *Argus Research Corp.*, B-249055, Oct. 20, 1992, 92-2 CPD ¶ 260.

¹⁰⁴ *Id.*

¹⁰⁵ *Keeson, Inc.*, B-245625, Jan. 24, 1992, 92-1 CPD ¶ 108.

¹⁰⁶ FAR § 9.201. The use of the qualified products list is inherently restrictive of competition and may be used only where the application is not unnecessarily restrictive. *McGean-Rohco, Inc.*, B-218616, Aug. 7, 1985, 85-2 CPD ¶ 140.

¹⁰⁷ *Stevens Technical Services, Inc.*, B-250515.2, May 17, 1993, 93-1 CPD ¶ 385, n.8.

¹⁰⁸ *Tura Machine Co.*, B-241426, Feb. 4, 1991, 91-1 CPD ¶ 114.

¹⁰⁹ *Interstate Diesel Services, Inc.*, B-230107, May 20, 1988, 88-1 CPD ¶ 480.

¹¹⁰ *Goodyear Tire & Rubber Co.*, B-247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315.

¹¹¹ 10 U.S.C. § 2319; 41 U.S.C. § 253c.

¹¹² *Advanced Seal Technology, Inc.*, B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137; *BWC Technologies, Inc.*, B-242734, May 16, 1991, 91-1 CPD ¶ 474.

¹¹³ *Alpha Technical Services, Inc.*, B-251147, Mar. 15, 1993, 93-1 CPD ¶ 234.

¹¹⁴ *Electro-Methods, Inc.*, B-255023.3, Mar. 4, 1994, 94-1 CPD ¶ 173.

¹¹⁵ *Advanced Seal Technology, Inc.*, note 112, *supra*.

¹¹⁶ *Lambda Signatics, Inc.*, B-257756, Nov. 7, 1994, 94-2 CPD ¶ 175; *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208.

¹¹⁷ *Iowa-Illinois Cleaning Co.*, B-254805, Jan. 18, 1994, 94-1 CPD ¶ 22.

¹¹⁸ *PBSI Corp.*, B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333.

¹¹⁹ *Cobra Technologies, Inc.*, B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310; *Roger L. Herbst*, B-244773, Nov. 19, 1991, 91-2 CPD ¶ 476.

¹²⁰ *Remtech, Inc.*, B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; *J & J Maintenance, Inc.*, B-239035, July 16, 1990, 90-2 CPD 35. See *Taina U.S. Inc.*, B-240892, Dec. 21, 1990, 90-2 CPD ¶ 517 (continuous operation merely "necessary").

¹²¹ *Aspen Cleaning Corp.*, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289.

¹²² *Maintrac Corp.*, B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257.

- 123 *Triple P Services, Inc.*, B-249443, Oct. 30, 1992, 92-2 CPD ¶ 313.
- 124 *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
- 125 *Resource Consultants, Inc.*, B-255053, Feb. 1, 1994, 94-1 CPD ¶ 59.
- 126 *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
- 127 *Space Vector Corp.*, B-253295.2, Nov. 8, 1993, 93-2 CPD ¶ 273.
- 128 *Titan Dynamics Simulations, Inc.*, B-257559, Oct. 13, 1994, 94-2 CPD ¶ 139;
Institutional Communications Co., B-233058.5, Mar. 18, 1991, 91-1 CPD ¶ 292.
- 129 *Electro-Methods, Inc.*, B-239141.2, Nov. 5, 1990, 90-2 CPD ¶ 363.
- 130 *Batch-Air, Inc.*, B-204574, Dec. 29, 1981, 81-2 CPD ¶ 509.
- 131 *TLC Services, Inc.*, B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.
- 132 *Astro-Valcour, Inc.*, B-257485, Oct. 6, 1994, 94-2 CPD ¶ 129.
- 133 *Precision Photo Laboratories Inc.*, B-251719, April 29, 1993, 93-1 CPD ¶ 359.
- 134 *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
- 135 *National Customer Engineering*, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 225.
- 136 *Eastern Trans-Waste Corp.*, B-214805, July 30, 1984, 84-2 CPD ¶ 126.
- 137 *Southwestern Bell Telephone Co.*, B-231822, Sept. 29, 1988, 88-2 CPD ¶ 300.
- 138 *Tucson Mobilephone, Inc.*, B-256802, July 27, 1994, 94-2 CPD ¶ 45.
- 139 *Chicago City Wide College*, B-218433, Aug. 6, 1985, 85-2 CPD ¶ 133;
Chicago City-Wide College, B-212274, Jan. 4, 1984, 84-1 CPD ¶ 51.
- 140 *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
- 141 *D. Moody & Co.*, B-185647, Sept. 1, 1976, 76-2 CPD ¶ 211.
- 142 *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.
- 143 *King-Fisher Co.*, B-256849, July 28, 1994, 94-2 CPD ¶ 62; *Tek Contracting, Inc.*, B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90.
- 144 *Talon Manufacturing Co.*, B-257536, Oct. 14, 1994, 94-2 CPD ¶ 140.

- 145 *G. H. Harlow Co.*, B-254839, Jan. 21, 1994, 94-1 CPD ¶ 29.
- 146 *I.T.S. Corp.*, B-243223, July 15, 1991, 91-2 CPD ¶ 55.
- 147 *Marine Transport Lines, Inc.*, B-224480.5, July 27, 1987, 87-2 CPD ¶ 91.
- 148 *Software City*, B-217542, April 26, 1985, 85-1 CPD ¶ 475.
- 149 *Marlen C. Robb & Son, Boatyard & Marina, Inc.*, B-256516, June 28, 1994, 94-1 CPD ¶ 392.
- 150 *Microwave Radio Corp.*, B-227962, Sept. 21, 1987, 87-2 CPD ¶ 288.
- 151 *GE American Communications, Inc.*, B-248575, Sept. 4, 1992, 92-2 CPD ¶ 155; *Yale Materials Handling Corp.*, B-230209, Mar. 23, 1988, 88-1 CPD ¶ 302.
- 152 *AAA Engineering & Drafting, Inc.*, B-237383, Jan. 22, 1990, 90-1 CPD ¶ 87; *Shoney's Inn*, B-231113, June 24, 1988, 88-1 CPD ¶ 609.
- 153 *Westcott General*, B-241570, Feb. 5, 1991, 91-1 CPD ¶ 120.
- 154 *NFI Management Co.*, B-240788, Dec. 12, 1990, 90-2 CPD ¶ 484.
- 155 *Canal Claiborne Ltd.*, B-244211, Sept. 23, 1991, 91-2 CPD ¶ 266.
- 156 *Pamela A. Lambert*, B-227849, Sept. 28, 1987, 87-2 CPD ¶ 308.
- 157 *CardioMetrix*, B-250247, Dec. 14, 1992, 92-2 CPD ¶ 414.
- 158 *Leo Kanner Assoc.*, B-194327, Nov. 5, 1979, 79-2 CPD ¶ 318. See *Bartow Group*, B-217155, Mar. 18, 1985, 85-1 CPD ¶ 320.
- 159 *Anglo American Auto Auctions, Inc.*, B-242538, April 29, 1991, 91-1 CPD ¶ 416.
- 160 *Days Inn Marina*, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23.
- 161 *Ramada Inn of Des Moines*, B-233504, Feb. 6, 1989, 89-1 CPD ¶ 123.
- 162 *Blaine Hudson Printing*, B-247004, April 22, 1992, 92-1 CPD ¶ 380.
- 163 *Pacific Bell Telephone Co.*, B-231403, July 27, 1988, 88-2 CPD ¶ 93.
- 164 *Pacific Architects & Engineers Inc.*, B-240310, Nov. 2, 1990, 90-2 CPD ¶ 359.

- ¹⁶⁵ *Computer Maintenance Operations Services*, B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170; *G. S. Link & Assocs.*, B-229604, Jan. 25, 1988, 88-1 CPD ¶ 70.
- ¹⁶⁶ *Phillips Cartner & Co.*, B-224370.2, Oct. 2, 1986, 86-2 CPD ¶ 382.
- ¹⁶⁷ *Chi Corp.*, B-224019, Dec. 3, 1986, 86-2 CPD ¶ 634.
- ¹⁶⁸ *Id.*
- ¹⁶⁹ *Libby Corp.*, B-220392, Mar. 7, 1986, 86-1 CPD ¶ 227.
- ¹⁷⁰ 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).
- ¹⁷¹ *Immunoanalysis/Diagnostixx of California Corp.*, B-254386, Dec. 8, 1993, 93-2 CPD ¶ 309.
- ¹⁷² *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208; *Colbar, Inc.*, B-230754, June 13, 1988, 88-1 CPD ¶ 562.
- ¹⁷³ *DOD Contracts, Inc.*, B-250603.2, Mar. 3, 1993, 93-1 CPD ¶ 195.
- ¹⁷⁴ *Equa Industries, Inc.*, B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96.
- ¹⁷⁵ *AUL Instruments, Inc.*, B-186319, Sept. 1, 1976, 76-2 CPD ¶ 212.
- ¹⁷⁶ *Camar Corp.*, B-253016, Aug. 11, 1993, 93-2 CPD ¶ 94.
- ¹⁷⁷ *Bironas, Inc.*, B-249428, Nov. 23, 1992, 92-2 CPD ¶ 365; *Constantine N. Polites & Co.*, B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132; *M. C. & D. Capital Corp.*, B-225830, July 10, 1987, 87-2 CPD ¶ 32.
- ¹⁷⁸ *Fry Communications, Inc.*, B-220451, Mar. 18, 1986, 86-1 CPD ¶ 265.
- ¹⁷⁹ *Pem All Fire Extinguisher Corp.*, B-231478, July 27, 1988, 88-2 CPD ¶ 95.
- ¹⁸⁰ *Coastal Computer Consultants Corp.*, B-253359, Sept. 7, 1993, 93-2 CPD ¶ 155.
- ¹⁸¹ *DGS Contract Services, Inc.*, B-249845.2, Dec. 23, 1992, 92-2 CPD ¶ 435.
- ¹⁸² *Coastal Computer Consultants Corp. v. Department of Commerce*, GSBICA No. 12869-P, 94-3 BCA ¶ 27,151; *InSyst Corp.*, GSBICA No. 9946-P, 89-2 BCA ¶ 21,782.
- ¹⁸³ *Lionhart Group, Ltd.*, B-257715, Oct. 31, 1994, 94-2 CPD ¶ 170.

¹⁸⁴ *Procurement: Better Compliance With the Competition in Contracting Act Is Needed*, GAO/NSIAD-87-145 (Aug. 26, 1987).

¹⁸⁵ *Procurement: Efforts Still Needed to Comply With the Competition in Contracting Act*, GAO/NSIAD-90-104 (May 1990).

¹⁸⁶ *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503.

¹⁸⁷ *Defense Inventory: Extent of Diminishing Manufacturing Sources Problems Still Unknown*, GAO/NSIAD-95-85 at 1 (April 1995).

¹⁸⁸ *Id.* at 1-2.

¹⁸⁹ *East West Research, Inc.*, B-239919, Aug. 28, 1990, 90-2 CPD ¶ 172; *Nasuf Construction Corp.—Recon.*, B-219733.2, Mar. 18, 1986, 86-1 CPD ¶ 263.

¹⁹⁰ 10 U.S.C. § 2305(a)(1)(A)(iii); 41 U.S.C. § 253a(a)(1)(C); FAR § 10.004(a)(1).

¹⁹¹ *Maremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.

¹⁹² Note 79, *supra*, and accompanying text.

¹⁹³ *Triple P Services, Inc.*, B-220437.3, April 3, 1986, 86-1 CPD ¶ 318.

¹⁹⁴ *Arthur Young & Co.*, B-216643, May 24, 1985, 85-1 CPD ¶ 598.

¹⁹⁵ *Federal Computer Corp.*, B-223932, Dec. 10, 1986, 86-2 CPD ¶ 665.

¹⁹⁶ *Communications Corps, Inc.*, B-179994, April 3, 1974, 74-1 CPD ¶ 168.

¹⁹⁷ *Consolidated Devices, Inc.—Recon.*, B-225602.2, April 24, 1987, 87-1 CPD ¶ 437.

¹⁹⁸ *See Interface Flooring Systems, Inc.*, B-225439, Mar. 4, 1987, 87-1 CPD ¶ 247.

¹⁹⁹ *Harris Corp.*, B-217174, April 22, 1985, 85-1 CPD ¶ 455.

²⁰⁰ *Express Signs International*, B-227144, Sept. 14, 1987, 87-2 CPD ¶ 243; *Korean Maintenance Co.*, B-223780, Oct. 2, 1986, 86-2 CPD ¶ 379.

²⁰¹ *ACRAN, Inc.*, B-225654, May 14, 1987, 87-1 CPD ¶ 509 at 7-8.

²⁰² *Parker's Mechanical Contractors, Inc.*, ASBCA No. 32842, 88-1 BCA ¶ 20,472. *Accord Electrical Contracting Corp. of Guam, Inc.*, ASBCA No. 33136, 90-3 BCA ¶ 22,974.

- 203 *Loral Fairchild Corp.*, B-242957, June 24, 1991, 91-1 CPD ¶ 594.
- 204 Note 185, *supra*, at 7.
- 205 *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Technocratica*, ASBCA No. 44134, 94-2 BCA ¶ 26,606.
- 206 *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).
- 207 *Henry Shirek*, ASBCA No. 28414, 86-1 BCA ¶ 18,560.
- 208 *Premiere Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *U.S. Defense Systems, Inc.*, B-251544, Mar. 30, 1993, 93-1 CPD ¶ 279.
- 209 See notes 88 and 89, *supra*, and accompanying text.
- 210 *C3, Inc.*, B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279.
- 211 *G. Marine Diesel*, B-232619, Jan. 27, 1989, 89-1 CPD ¶ 90.
- 212 *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *A. J. Fowler Corp.*, B-233326, Feb. 16, 1989, 89-1 CPD ¶ 166.
- 213 FAR § 15.605(e); *North-East Imaging, Inc.*, B-256281, June 1, 1994, 94-1 CPD ¶ 332; *Lewis & Smith Construction Co.*, B-253382, Sept. 8, 1993, 93-2 CPD ¶ 150; *T. H. Taylor, Inc.*, B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.
- 214 *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244. *Accord Essex Electro Engineers, Inc.*, B-252288.2, July 23, 1993, 93-2 CPD ¶ 47.
- 215 *J. A. Jones Management Services, Inc.*, B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.
- 216 *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223.
- 217 *Loral Aerospace Corp.*, B-258817, Feb. 21, 1995, 95-1 CPD ¶ 97.
- 218 *Chadwick-Helmuth Co.*, B-238645.2, Nov. 19, 1990, 90-2 CPD ¶ 400.
- 219 *Princeton Gamma-Tech, Inc.*, B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175. The Request for Proposals said proposals must reflect if the product "meets or exceeds" the specifications, but it did not indicate points would be scored for exceeding the performance requirements.

²²⁰ *Astrophysics Research Corp.*, B-228718.3, Feb. 18, 1988, 88-1 CPD ¶ 167 at 4.

²²¹ See *Able-One Refrigeration, Inc.*, B-244695, Oct. 28, 1991, 91-2 CPD ¶ 384; *Power Conversion, Inc.*, B-239301, Aug. 20, 1990, 90-2 CPD ¶ 145.

²²² *American Development Corp.*, B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.

²²³ CICA § 2711(a)(1), 2723, note 9, *supra*.

²²⁴ 50 Fed. Reg. 1726, 1740 (Jan. 11, 1985).

²²⁵ *Hydrosience, Inc.*, B-227989, Nov. 23, 1987, 87-2 CPD ¶ 501; *Engineering Consultants & Publications—Recon.*, B-225982.5, June 16, 1987, 87-1 CPD ¶ 598.

²²⁶ *Coopers & Lybrand*, B-224213, Jan. 30, 1987, 87-1 CPD ¶ 100.

²²⁷ *Hoffman Management, Inc.*, B-238752, July 6, 1990, 90-2 CPD ¶ 15.

²²⁸ *Ward/Hall Associates ALA*, B-226714, June 17, 1987, 87-1 CPD ¶ 605.

²²⁹ Section 802(a), National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 105 Stat. 1588 (Nov. 5, 1990), *amended by* 10 U.S.C. § 2305(a)(2)(A).

²³⁰ H.R. Rep. No. 101-665, 101st Cong., 2d Sess., 1990 U.S. Code Cong. & Admin. News 2931, 3029.

²³¹ *Macro Service Systems, Inc.*, B-246103, Feb. 19, 1992, 92-1 CPD ¶ 200.

²³² *DeLima Assoc.*, B-258278.2, Dec. 20, 1994, 94-2 CPD ¶ 253.

²³³ *Avogadro Energy Systems*, B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229.

²³⁴ *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223; *Specialized Technical Services, Inc.*, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510.

²³⁵ *Information Systems Networks, Inc.*, B-254384.3, Jan. 21, 1994, 94-1 CPD ¶ 27.

²³⁶ *Information Spectrum, Inc.*, B-256609.3, Sept. 1, 1994, 94-2 CPD ¶ 251.

²³⁷ *System Resources, Inc. v. Department of the Navy*, GSBICA No. 12536-P, 94-1 BCA ¶ 26,388 at 131,282.

²³⁸ *Richard S. Cohen*, B-256017.4, June 27, 1994, 94-1 CPD ¶ 382 at 6.

- 239 *Sunbelt Properties, Inc.*, B-249469, Nov. 17, 1992, 92-2 CPD ¶ 353.
- 240 *Scientex Corp.*, B-238689, June 29, 1990, 90-1 CPD ¶ 597.
- 241 *Eagle Research Group, Inc.*, B-230050, May 13, 1988, 88-2 CPD ¶ 123.
- 242 *White Water Assocs., Inc.*, B-244467, Oct. 22, 1991, 91-2 CPD ¶ 356.
- 243 *donald clark Assocs.*, B-253387, Sept. 15, 1993, 93-2 CPD ¶ 168 at 4.
- 244 *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.
- 245 *See, e.g., N W Ayer Inc.*, B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154.
- 246 *Colbar, Inc.*, B-227555.4, Feb. 19, 1988, 88-1 CPD ¶ 168.
- 247 *See, e.g., S and T Services*, B-252359, June 15, 1993, 93-1 CPD ¶ 464; *Cook Travel*, B-238527, June 13, 1990, 90-1 CPD ¶ 571.
- 248 *Centex Construction Co.*, B-238777, June 14, 1990, 90-1 CPD ¶ 566.
- 249 *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240.
- 250 *See Telos Field Engineering*, B-251384, March 26, 1993, 93-1 CPD ¶ 271.
- 251 *See Telos Field Engineering*, note 249, *supra*; *S & G Industries, Inc.*, B-255263, Feb. 1, 1994, 94-1 CPD ¶ 81.
- 252 *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71.
- 253 *Bell Free Contractors, Inc.*, B-227576, Oct. 30, 1987, 87-2 CPD ¶ 418.
- 254 *Bionetics Corp.*, B-258106, Dec. 9, 1994, 94-2 CPD ¶ 231.
- 255 *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3.
- 256 *J. A. Reyes Assocs., Inc.*, B-230170, June 7, 1988, 88-1 CPD ¶ 536.
- 257 *Analex Space Systems, Inc.*, B-259024, Feb. 21, 1995, 95-1 CPD ¶ 106.
- 258 *Irwin & Leighton, Inc.*, B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208.
- 259 *Systematic Management Services, Inc.*, B-250173, Jan. 14, 1993, 93-1 CPD ¶ 41.
- 260 *American Service Technology, Inc.*, B-255075, Feb. 4, 1994, 94-1 CPD ¶ 72.

²⁶¹ *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3; *Renow, Inc.*, B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210.

²⁶² *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188. *See also Ogden Government Services*, B-253794.2, Dec. 27, 1993, 93-2 CPD ¶ 339.

²⁶³ *Scheduled Airlines Traffic Offices, Inc.*, B-253856.7, Nov. 23, 1994, 95-1 CPD ¶ 33.

²⁶⁴ *DRT Assocs., Inc.*, B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47.

²⁶⁵ *Scientific Management Assocs., Inc.*, B-238913, July 12, 1990, 90-2 CPD ¶ 27.

²⁶⁶ *Abel Converting, Inc.*, B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130.

²⁶⁷ *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.

²⁶⁸ *Abt Assocs., Inc.*, B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269.

²⁶⁹ *Maremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.

²⁷⁰ FAR § 9.104-1.

²⁷¹ FAR § 9.103(b).

²⁷² FAR § 9.103(c).

²⁷³ *Continental Maritime of San Diego, Inc.*, B-249858.2, Feb. 11, 1993, 93-1 CPD ¶ 230.

²⁷⁴ *Id.* at 7.

²⁷⁵ *PHE/Maser, Inc.*, B-238367.5, Aug. 28, 1991, 91-2 CPD ¶ 210; *Flight International Group, Inc.*, B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.

²⁷⁶ *Danville-Findorff, Ltd.*, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232; *Greyback Concession*, B-239913, Oct. 10, 1990, 90-2 CPD ¶ 278.

²⁷⁷ *Electrolux SARL*, B-248742, Sept. 21, 1992, 92-2 CPD ¶ 192.

²⁷⁸ *McLaughlin Research Corp.*, B-247118, May 5, 1992, 92-1 CPD ¶ 422; *Wickman Spacecraft & Propulsion Co.*, B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690.

²⁷⁹ *FMS Corp.*, B-255191, Feb. 8, 1994, 94-1 CPD ¶ 182.

- 280 *Southwest Resource Development*, B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295; *Applied Research Technology*, B-240230, Nov. 2, 1990, 90-2 CPD ¶ 358.
- 281 *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.
- 282 *F&H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.
- 283 *Racal Guardata, Inc.*, B-245139.2, Feb. 7, 1992, 92-1 CPD ¶ 159.
- 284 *Suncoast Scientific Inc.*, B-240689, Dec. 10, 1990, 90-2 CPD ¶ 468.
- 285 *Central Air Service, Inc.*, B-242283.4, June 26, 1991, 91-2 CPD ¶ 8.
- 286 *Duke/Jones Hanford, Inc.*, B-249367.10, July 13, 1993, 93-2 CPD ¶ 26; *Instrument Control Service, Inc.*, B-247286, April 30, 1992, 92-1 CPD ¶ 407.
- 287 *Pacific Computer Corp.*, B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292.
- 288 *Kunkel-Wiese, Inc.*, B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.
- 289 *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240; *NITCO*, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212.
- 290 *Management & Industrial Technologies Assocs.*, B-257656, Oct. 11, 1994, 94-2 CPD ¶ 134; *Crimson Enterprises, Inc.*, B-243193.4, June 12, 1992, 92-1 CPD ¶ 512.
- 291 *Mesa, Inc.*, B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62; *Aumann, Inc.*, B-251585.2, May 28, 1993, 93-1 CPD ¶ 423; *Talon Corp.*, B-248086, July 27, 1992, 92-2 CPD ¶ 55.
- 292 *PCL/American Bridge*, B-254511.2, Feb. 24, 1994, 94-1 CPD ¶ 142; *Technology & Management Services, Inc.*, B-240351, Nov. 7, 1990, 90-2 CPD ¶ 375.
- 293 *See Pannesma Co.*, B-251688, April 19, 1993, 93-1 CPD ¶ 333.
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²⁹⁸ *CACI, Inc.*, B-225444, Jan. 13, 1987, 87-1 CPD ¶ 53.

²⁹⁹ *John Brown U.S. Services, Inc.*, B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 at 10.

³⁰⁰ *Premier Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *Advanced Resources Int'l, Inc.—Recon.*, B-249679.2, April 29, 1993, 93-1 CPD ¶ 348.

³⁰¹ *Individual Development Assocs., Inc.*, B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.

³⁰² *Litton Systems, Inc.*, B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 7-8.

³⁰³ *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *Triton Marine Construction Corp.*, B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171.

³⁰⁴ *RAI, Inc.*, B-250663, Feb. 16, 1993, 93-1 CPD ¶ 140; *Earth Resources Corp.*, B-248662.2, Nov. 5, 1992, 92-2 CPD ¶ 323.

³⁰⁵ *Nicolet Instrument Corp.*, B-258569, Feb. 3, 1995, 95-1 CPD ¶ 48.

³⁰⁶ *SeaSpace*, B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179.

³⁰⁷ *DUAL, Inc.*, B-252593.3, Aug. 31, 1993, 93-2 CPD ¶ 190.

³⁰⁸ *Michael C. Avino, Inc.*, B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148.

³⁰⁹ *John Brown E & C*, B-243247, July 5, 1991, 91-2 CPD ¶ 27.

³¹⁰ *Cherry Hill Travel Agency, Inc.*, B-240386, Nov. 19, 1990, 90-2 CPD ¶ 403.

³¹¹ *Picker Int'l, Inc.*, B-249699.3, Mar. 30, 1993, 93-1 CPD ¶ 275.

³¹² *See ALM, Inc.*, B-225589, May 7, 1987, 87-1 CPD ¶ 486.

³¹³ *Northwest EnviroService, Inc.*, B-247380.2, July 22, 1992, 92-2 CPD ¶ 38. *See Sperry Corp.*, B-225492, Mar. 25, 1987, 87-1 CPD ¶ 341.

³¹⁴ *See Robert J. Kenney, Jr. & Daniel C. Sweeney, Best Value Procurement*, Briefing Paper 93-4, Federal Publications Inc. (Mar. 1993).

³¹⁵ *Southern Commercial Industries, Inc.*, B-229969, April 25, 1988, 88-1 CPD ¶ 397.

³¹⁶ *See Corbetta Construction Co.*, B-182979, Sept. 12, 1975, 75-2 CPD ¶ 144.

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324 *F & H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.

325 *Data Systems Analysts, Inc.*, B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.

326 *Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38; *Advanced Resources Int'l, Inc.*, B-249679, Nov. 18, 1992, 92-2 CPD ¶ 357.

327 *Califone Int'l, Inc.*, B-246233, Feb. 25, 1992, 92-1 CPD ¶ 226; *Arrowsmith Industries, Inc.*, B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129.

328 *Renic Corp.*, B-248100, July 29, 1992, 92-2 CPD ¶ 60.

329 *Clegg Industries, Inc.*, B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145.

330 See FAR § 9.104-1.

331 *Quoted in Thirteenth Annual Report of the Select Committee on Small Business of the United States Senate*, S. Rep. No. 104, 88th Cong., 1st Sess. at 31 (April 2, 1963).

332 3 Comp. Dec. 437, 438 (1897).

333 7 Comp. Dec. 712, 714 (1901).

334 25 Comp. Dec. 398, 404 (1918).

335 32 Comp. Gen. 384, 387 (1953).

336 10 Comp. Gen. 294, 300 (1931).

³³⁷ 20 Comp. Gen. 18, 21 (1940). Contract provisions are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation. 18 Comp. Gen. 285, 295 (1938).

³³⁸ 20 Comp. Gen. 18, 21 (1940).

³³⁹ Unpub. Comp. Gen., A-33338 (Oct. 3, 1930).

³⁴⁰ Unpub. Comp. Gen., A-26439 (April 12, 1929).

³⁴¹ 31 U.S.C. § 1341.

³⁴² FAR § 10.002(a)(4). See *Project Software & Development, Inc.*, GSBCA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,403 (if expressions of actual requirements overstate an agency's needs, those expressions are improper).

³⁴³ *Greenborne & O'Mara—Recon.*, B-247116.3, Oct. 7, 1992, 92-2 CPD ¶ 229 at 2-3.

³⁴⁴ *East West Research, Inc.*, B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178; *Consolidated Maintenance Co.*, B-220174, Nov. 12, 1985, 85-2 CPD ¶ 539.

³⁴⁵ *Digital Equipment Corp.*, B-183614, Jan. 14, 1976, 76-1 CPD ¶ 21.

³⁴⁶ *Jones Refrigeration Service*, B-221661.2, May 5, 1986, 86-1 CPD ¶ 431.

³⁴⁷ *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.

³⁴⁸ *National Steel & Shipbuilding Co.*, B-250305.2, Mar. 23, 1993, 93-1 CPD ¶ 260; *Trident Systems Inc.*, B-243101, June 25, 1991, 91-1 CPD ¶ 604.

³⁴⁹ *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244.

³⁵⁰ *Astro Pak Corp.*, B-256345, June 6, 1994, 94-1 CPD ¶ 352; *Marine Instrument Co.*, B-241292.3, Mar. 22, 1991, 91-1 CPD ¶ 317.

³⁵¹ *Computervision Corp.*, GSBCA No. 8601-P, 86-3 BCA ¶ 19,266 at 97,409.

³⁵² *Sierra Technology & Resources, Inc.*, B-243777.3, May 19, 1992, 92-1 CPD ¶ 450; *Microeconomic Applications, Inc.*, B-224560, Feb. 9, 1987, 87-1 CPD ¶ 137.

³⁵³ *Paul G. Koukoulas*, B-229650, Mar. 16, 1988, 88-1 CPD ¶ 278.

³⁵⁴ *American Contract Services, Inc.*, B-256196.2, June 2, 1994, 94-1 CPD ¶ 342; *SeaSpace Corp.*, B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.

- 355 *Arthur Anderson & Co.*, B-245903, Feb. 10, 1992, 92-1 CPD ¶ 168 at 4.
- 356 *Id.*; *Cadmus Group, Inc.*, B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271.
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- 358 *SEC, Inc.*, B-226978, July 13, 1987, 87-2 CPD ¶ 38.
- 359 *Calspan Corp.*, B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.
- 360 *Barron Builders & Management Co.*, B-225803, June 30, 1987, 87-1 CPD ¶ 645 at 4-5.
- 361 *Ogden Plant Maintenance Co.*, B-255156.2, April 7, 1994, 94-1 CPD ¶ 275 at 5.
- 362 *Benchmark Security, Inc.*, B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133; *Wyle Laboratories, Inc.*, B-239113, Aug. 6, 1990, 90-2 CPD ¶ 107.
- 363 See Paul Shnitzer & Thomas P. Humphrey, *The Scope of the Source Selection Official's Discretion*, Briefing Paper 94-5, Federal Publications Inc. (April 1994).
- 364 *Contel Federal Systems, Inc.*, GSBGA No. 9743-P, 89-1 BCA ¶ 21,458 at 108,124.
- 365 19 F.3d 1342 (11th Cir. 1994).
- 366 *East West Research, Inc.*, B-238633, June 13, 1990, 90-1 CPD ¶ 555.
- 367 *Mart Corp.*, B-254967.3, Mar. 28, 1994, 94-1 CPD ¶ 215. In *Corbin Superior Composites, Inc.*, B-242394, April 19, 1991, 91-1 CPD ¶ 389 at 5, the Comptroller General said it would question the agency's determination of minimum needs only if it had "no reasonable basis."
- 368 *JSA Healthcare Corp.*, B-252724, July 26, 1993, 93-2 CPD ¶ 54; *Federal Environmental Services, Inc.*, B-250135.4, May 24, 1993, 93-1 CPD ¶ 398.
- 369 *General Crane & Hoist, Inc.*, B-258819, Feb. 21, 1995, 95-1 CPD ¶ 99; *Family Realty*, B-247772, July 6, 1992, 92-2 CPD ¶ 6.
- 370 *Brunswick Defense*, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225; *COMSAT Int'l Communications, Inc.*, B-223953, Nov. 7, 1986, 86-2 CPD ¶ 532 ("We will question contracting officials' determinations only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations.")

- ³⁷¹ *KPMG Peat Marwick*, B-255224, Feb. 15, 1994, 94-1 CPD ¶ 111.
- ³⁷² *Johns Hopkins Univ.*, B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240.
- ³⁷³ *D. M. Potts Corp.*, B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65.
- ³⁷⁴ *Pratt & Lambert, Inc.*, B-245537, Jan. 9, 1992, 92-1 CPD ¶ 48.
- ³⁷⁵ *Aspect Telecommunications*, GSBCA No. 11250-P, 91-3 BCA ¶ 24,199.
- ³⁷⁶ *Computer Lines*, GSBCA No. 8206-P, 86-1 BCA ¶ 18,653.
- ³⁷⁷ *Materials, Communication & Computers, Inc. v. Defense Logistics Agency*, GSBCA No. 12930-P, 95-1 BCA ¶ 27,312.
- ³⁷⁸ *TRW Inc.*, GSBCA No. 11309-P, 92-1 BCA ¶ 24,389.
- ³⁷⁹ *Latecoere International, Inc. v. United States*, note 365, *supra*, and cases cited at 1356.
- ³⁸⁰ Acquisition Reform, 60 Fed. Cont. Rep. 235 (Sept. 13, 1993).
- ³⁸¹ Steven Kelman, *Procurement and Public Management 1* (American Enterprise Institute Press 1990).
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- ³⁸³ *A Guide to Best Practices for Past Performance*, Office of Federal Procurement Policy (Interim ed. May 1995).
- ³⁸⁴ *Id.* at 13.
- ³⁸⁵ *Laidlaw Environmental Services, Inc.*, B-256346, June 14, 1994, 94-1 CPD ¶ 365 at 6-7.
- ³⁸⁶ *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71 at 6-7.
- ³⁸⁷ *Young Enterprises, Inc.*, B-256851.2, Aug. 11, 1994, 94-2 CPD ¶ 159 at 4-5.
- ³⁸⁸ Federal Acquisition Reform Act of 1995, Special Supplement, 63 Fed. Cont. Rep. No. 20 (May 22, 1995).
- ³⁸⁹ *Id.* at S-7.
- ³⁹⁰ Acquisition Reform, 63 Fed. Cont. Rep. 641, 643 (May 22, 1995).

³⁹¹ 141 *Cong. Rec.* H5912 (daily ed. June 14, 1995).

³⁹² *Id.* at H5926.

³⁹³ *Id.* at H5936; 63 *Fed. Cont. Rep.* 743 (June 19, 1995).

³⁹⁴ 141 *Cong. Rec.* H5924, H5930-31 (daily ed. June 14, 1995).

³⁹⁵ *Id.* at H5932.

³⁹⁶ No. 93-1373 (July 26, 1995).

³⁹⁷ FAR § 15.609(a).

³⁹⁸ See Special Supplement, 63 *Fed. Cont. Rep.* No. 12 (Mar. 27, 1995).

³⁹⁹ *Id.* at S-77.

⁴⁰⁰ FAR § 15.609(a); *Reliable System Services Corp.*, B-248126, July 28, 1992, 92-2 CPD ¶ 57.

⁴⁰¹ *PeopleWorks, Inc.*, B-257296, Sept. 2, 1994, 94-2 CPD ¶ 89; *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188.

⁴⁰² *ARC Professional Services Group, Inc. v. General Services Administration*, GSBGA No. 12699-P, 94-2 BCA ¶ 26,845 at 133,573; *Integrated Systems Group, Inc.*, GSBGA No. 11156-P, 91-2 BCA ¶ 23,961 at 119,956.

⁴⁰³ *EER Systems Corp.*, B-256383, June 7, 1994, 94-1 CPD ¶ 354; *Information Systems & Networks Corp.*, B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30.

⁴⁰⁴ *Telcom Systems Services, Inc. v. Department of the Interior*, GSBGA No. 12993-P, 95-1 BCA ¶ 27,346; *Information Ventures, Inc.*, B-243929, Sept. 9, 1991, 91-2 CPD ¶ 227.

⁴⁰⁵ *National Systems Management Corp.*, B-242440, April 25, 1991, 91-1 CPD ¶ 408; *StaffAll*, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195.

⁴⁰⁶ 141 *Cong. Rec.* H5930-31 (daily ed. June 14, 1995).

⁴⁰⁷ *Pendus Building Services, Inc.*, B-25721.3, Mar. 8, 1995, 95-1 CPD ¶ 135 (even acceptable proposals with no reasonable chance of award can be excluded); *Better Service*, B-256498.2, Jan. 9, 1995, 95-1 CPD ¶ 11 (proposal lacking sufficient information to determine compliance can be excluded without discussions).

⁴⁰⁸ See notes 10, 11, and 12, *supra*.

⁴⁰⁹ Edward Felsenthal, *Weekend Warriors Find a New Arena: Court*, Wall St. J., June 23, 1995, at B1.

⁴¹⁰ Robert Bolt, *A Man For All Seasons* 66 (Vintage International 1990).

SPECIAL SUPPLEMENT

COMPETITION REQUIREMENTS IN PUBLIC CONTRACTING:

The Myth of Full and Open Competition

An Analysis by

Marshall J. Doke, Jr.

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COMPETITION REQUIREMENTS IN PUBLIC CONTRACTING: **The Myth of Full and Open Competition**

*Marshall J. Doke, Jr.**



Marshall J. Doke, Jr.

Introduction

One of the most fundamental differences between government contracting and contracts involving private parties is the legal requirement for competition in public contracting. Individuals and private businesses may contract with whom, for whatever, and in any manner they choose. They may *choose* to obtain some formal or informal competition in purchasing products or services, but there is no legal requirement to do so. Since there is no such requirement, there is no penalty for failing to use competitive procedures or for using them improperly. Most non-governmental buyers may make any or all purchases on a sole source basis—even from family members—buy more than they need or can afford, and even accept whatever gifts, entertainment or “kickbacks” a vendor may offer.

Like private individuals and businesses, “the Government enjoys the unrestricted power to produce its own supplies, to determine those with whom it will deal, and to fix the terms and conditions upon which it will make needed purchases.”¹ However, as Mr. Justice Holmes said, the Government needs the protection of publicity and form in order to prevent possible fraud upon it by officers.² Congress, incident to its power to authorize and enforce contracts, may require that they be carried out only in a manner consistent with its views of public policy.³

One of the earliest and most basic protections adopted by the Government in public contracting was the requirement for competition. As discussed below, Congress has required the use of competition in public contracting for nearly 200 years. There also is a long history of executive agencies resisting the competition requirements. As stated by the House Committee on Government Operations, government officials often seek to limit the number of vendors that can compete:

This tactic undermines the Federal procurement system and results in excessive costs to the taxpayer. There is, unfortunately, a general attitude pervasive throughout the government that expanding the competitive base for government procurement is too costly, burdensome, and disruptive to agency activities. While the use of competition may not be considered worthwhile by some officials, it is the only way for the government to obtain the best products for the best prices.⁴

Competition is not a procurement *procedure* but an *objective*, which a procedure is designed to attain;⁵ it is not simply a *means* to an end, but rather an *end* in and of itself. Executive agencies

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convinced Congress in 1984 that competition could be increased by relaxing competitive procedures. These relaxed procedures (*i.e.*, putting competitive proposals on a par with sealed bids) have obscured and, in many cases, undermined the true goals of competition by allowing contracts to be awarded to higher-priced offerors based on undisclosed rating systems for multiple and subjective evaluation factors such as aesthetics, corporate capability, employment policies, innovativeness, oral presentations, risk, understanding requirements, etc. The increase of discretion in evaluation caused by the subjective evaluation criteria in turn has led to increased bid protests by competitors attempting to learn what rules were applied and why the discretion was exercised to their prejudice.

Since competition is an objective and not a procedure, the goal of competition should be applicable to all products and services acquired by the Government. This means that the goal of competition is not inconsistent with the acquisition of commercial products. While some of the Government's current procurement policies (such as access to records, requirements for cost or pricing data, rights in technical data, etc.) and procedures (specifications, statements of work, inspections) may be impediments to purchasing commercial products, a requirement for competition is not. The increased acquisition of commercial products will necessitate different rules of competition, but the products can be acquired competitively nonetheless.

That competition is under attack is well known; there are various proposals pending in Congress and the Executive Branch to further relax competitive procedures and even limit the statutory requirement for full and open competition. (Ironically, these initiatives to curtail competition in the context of domestic procurements are occurring at the same time that the Government is promoting the expansion of competition in international procurement agreements.) What perhaps is not so well known is that competition has been under attack for some time, with the result being that there has been an erosion of the full and open competition standard.

This article reviews the background of, and current requirements for, full and open competition in U.S. Government contracting. It is submitted that the avowed full and open competition standard has been eroded to the point where it is today more myth than reality and that efforts to encroach still more on this standard are unwise and unwarranted.

Background

Purposes and Benefits of Competition

The chief purposes of competition in public contracting are to afford private sector individuals and entities that seek to do business with the Government an opportunity to do so, to obtain lower prices, and to avoid fraud, favoritism, and abuse.

The purpose of these statutes and regulations is to give all persons equal right to compete for Government contracts; to prevent unjust favoritism, or collusion or fraud in the letting of contracts for the purchase of supplies; and thus to secure for the Government the benefits which arise from competition. In furtherance of such purpose, invitations and specifications must be such as to permit competitors to compete on a common basis. Conditions or limitations which have no reasonable relation to the actual needs of the service and which are designed to limit bidding to one of several sources of supply are interdicted, and render the award of a contract made in such circumstances voidable.⁶

It follows that, in order to achieve the purpose of competitive bidding by government agencies, it is necessary to eliminate or limit the discretion of contracting officials in areas that are susceptible to abuses, such as fraud, favoritism, improvidence, and extravagance.⁷

In addition to ensuring that a procurement is open to all responsible suppliers, competition is intended to provide the Government with an opportunity to receive fair and reasonable prices.⁸ Reports from the

House and Senate Committees considering the Competition in Contracting Act of 1984 (CICA)⁹ estimated the savings from competition at between 15 and 70 percent per procurement.¹⁰ Some 20 years earlier, the Department of Defense (DOD) reported to Congress that its studies showed that "each dollar spent under price competition buys at least 25 percent more."¹¹ One year later, Defense Secretary Robert S. McNamara told Congress:

Failure to use competition more extensively in Defense procurement in the past has not only resulted in higher prices, but has also deprived us of the benefits of a broader industrial base among suppliers, both large and small.¹²

The benefit of competition both to the Government and to the public in terms of price and other factors is directly proportional to the extent of competition.¹³

The legislative history of CICA identified other benefits of competition; namely, curbing cost growth, promoting innovative and technical changes, and increasing product quality and reliability.¹⁴

The last, and possibly the most important, benefit of competition is its inherent appeal of "fair play." Competition maintains the integrity in the expenditure of public funds by ensuring that government contracts are awarded on the basis of merit rather than favoritism.¹⁵

History of Competition Requirements

During the Revolutionary War, government purchasing was characterized by sharp practices, profiteering, and kickbacks. Over the years, competition and sealed bidding were gradually adopted in order to combat fraud and abuse.¹⁶ Congress established the requirement for competition in contracting, with formal advertising as the preferred method, in 1809.¹⁷ Various other statutes requiring formal advertising were enacted between 1809 and 1861, when the law requiring advertising for *all* purchases and contracts for supplies or services (except personal services) was enacted.¹⁸ This law later became Section 3709 of the Revised Statutes, which was the principal government procurement statute.¹⁹

Section 3709 did not expressly describe the scope of required competition. The "advertising" method itself suggests unlimited competition. The statute implied, therefore, the broadest possible scope of competition. As early as 1931, the Comptroller General referred to the scope of required competition as "full and free" competition²⁰ and "full and open" competition.²¹ He said every effort should be made to "permit the broadest field of competition."²² As stated in a Department of Defense procurement presentation to the Procurement Subcommittee of the Senate Committee on Armed Services in 1960:

Section 3709, Revised Statutes, contemplates that in purchasing for Government needs the *widest competition possible* be had, and that all qualified persons be given opportunity to compete. To confine invitations to bid [to] a comparative few of those in position to supply the needs of the Government is not in compliance with the statute.

(Emphasis added.)²³

At the beginning of World War II, Congress gave the President emergency authority to enter into contracts and modifications of contracts without regard to other provisions of law based upon findings that such actions would facilitate the prosecution of the war.²⁴ This emergency authority expired at the end of the war. The subject of peacetime procurement was considered by the Procurement Policy Board of the War Production Board, which was composed of representatives of the various contracting agencies. This resulted in a recommendation for new legislation to permit the use of negotiation "rather than the rigid limitations of formal advertising, bid and award procedures."²⁵ This recommendation resulted in the Armed Services Procurement Act of 1947, which contained a general requirement for advertising for bids but permitted negotiation in 17 exceptions contained in Section 2(c) of the law.²⁶

Section 3(a) of the Armed Services Procurement Act stated that whenever advertising is required:

The advertisement for bids shall be a sufficient time previous to the purchase or contract, and specifications and invitations for bids shall permit such *full and free competition* as is consistent with the procurement of types of supplies and services necessary to meet the requirements of the agency concerned.

(Emphasis added.)²⁷ There was no discussion or explanation of the phrase "full and free competition" in the reports accompanying the legislation. For some unexplained reason, the phrase was changed to "free and full competition" when the law was codified as 10 U.S.C. § 2305.²⁸ In advocating the legislation, Congress was told:

The War and Navy Departments firmly support the principle that, in peacetime, competitive bidding should be the ordinary method of procurement. The primary purpose of the bill is to permit the War and Navy Departments to award contracts by negotiation in those exceptional cases where the national defense or sound business judgment dictates the use of negotiation rather than the rigid limitations of formal advertising, bid and award procedures.²⁹

The legislative history states that the purpose of the Armed Services Procurement Act was to "return to normal purchasing procedures through the advertising-bid method on the part of the armed services."³⁰ The statutory requirement in formal advertising for "such full and free competition as is consistent with the procurement" also was included in Section 303(a) of the Federal Property and Administrative Services Act of 1949,³¹ which was applicable to civilian agencies and which contained 15 exceptions permitting negotiation.

Current Competition Requirements

In the years following enactment of the Armed Services Procurement Act and the Federal Property and Administrative Services Act, negotiation became less the exception and more the rule. By 1960, negotiation accounted for 85% of all federal contract dollars and, as a result, the Armed Services Procurement Act was amended in 1962 to encourage the use of formal advertising and to obtain more competition in negotiated procurements.³² Based on its continued concern over the use of noncompetitive procedures, the Senate Committee on Governmental Affairs held hearings in 1982 at which the consensus among the witnesses was that "competition in government contracting may be the requirement, but not the practice."³³ Congress responded with CICA, the objective of which was to "establish an absolute preference for competition."³⁴

CICA amended the Federal Property and Administrative Services Act to require that, with certain exceptions, civilian agencies use "full and open competition through the use of competitive procedures."³⁵ CICA also amended the Armed Services Procurement Act to require (also with exceptions) that bids and proposals be solicited "in a manner designed to achieve full and open competition for the procurement."³⁶ CICA amended both laws to permit "restrictive provisions or conditions," but only to the extent necessary to satisfy the needs of the agency or as authorized by law.³⁷ The House-Senate Conference Committee said this and other provisions were included "in order to maximize, rather than limit, competition."³⁸

The Senate provisions leading to CICA had used "effective" competition as the standard for awarding contracts (i.e., a marketplace condition resulting from the receipt of two or more independently submitted bids or proposals).³⁹ The Conference Committee, however, substituted the "full and open competition" standard, stating:

The conference substitute uses "full and open" competition as the required standard for awarding contracts in order to emphasize that all responsible sources are permitted to submit bids

or proposals for a proposed procurement. The conferees strongly believe that the procurement process should be open to all capable contractors who want to do business with the Government. The conferees do not intend, however, to change the long-standing practice in which contractor responsibility is determined by the agency after offers are received.⁴⁰

The phrase "full and open competition" was defined in CICA to mean that "all responsible sources are permitted to submit sealed bids or competitive proposals," and the phrase "competitive procedures" was defined to mean "procedures under which an agency enters into a contract pursuant to full and open competition."⁴¹

The strong congressional policy favoring competition also was reflected by the CICA provision establishing in all executive agencies a "competition advocate" with the specific responsibility for challenging barriers to and promoting full and open competition in the procurement of property and services.⁴² This strong policy has been interpreted as requiring agencies to satisfy more stringent requirements than had previously been the case in order to enter into contracts using other than full and open competition.⁴³

Exceptions to Competition Requirements

There are nine exceptions to the requirement for full and open competition. They are listed here to illustrate current flexibility in government acquisitions. The first seven are expressly stated in CICA; the eighth is implied in CICA, and the last is derived from case law.

1. Limited Sources — Full and open competition is not required when property or services are available from one source and no other type of supplies or services will satisfy the agency's needs.⁴⁴ Since 1987, DOD, the National Aeronautics and Space Administration, and the Coast Guard can use this exception if the property or services are available only from "a limited number of responsible sources."⁴⁵ This authority may be used in certain cases for contracts based on unsolicited research proposals and follow-on contracts for a major system or highly specialized equipment.⁴⁶

2. Urgency — Full and open competition is not required when an agency's need for property or services "is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals."⁴⁷ Agencies using this exception, however, must request offers from as many potential sources as practical.⁴⁸ An urgency justification does not support the procurement of more than a minimum quantity needed to satisfy the immediate urgent requirement and should not continue for more than a minimum time.⁴⁹ Further, urgency may justify *award* of a contract but not the inclusion of contract options.⁵⁰

3. Industrial Capability and Availability — Another exception is available to award contracts to maintain the availability of a facility, producer, manufacturer, or supplier in case of a national emergency or to achieve industrial mobilization or to establish or maintain an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally-funded research and development center.⁵¹

4. International Agreements — Full and open competition is not required when an international agreement or treaty, or the written direction of a foreign government reimbursing the agency for the cost of the procurement, has the effect of precluding full and open competition.⁵² This is the authority used for foreign military sales (FMS) under the Arms Export Control Act.⁵³

5. Authorized or Required by Law — If a statute "expressly" authorizes or requires that the acquisition be made through another agency or from a specified source, or if a brand-name commercial item is needed for authorized resale, full and open competition is not required.⁵⁴ This authority is used for awards under the Small Business Act's Section 8(a) program, purchases from the Federal Prison

Industries, purchases from nonprofit agencies for the blind or severely handicapped, and government printing and binding.³⁵

6. National Security — Full and open competition need not be utilized when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals.³⁶ Agencies relying on this exception are required to solicit as many sources as practicable, and classified procurements should be competed among all contractors having proper security clearances.³⁷

7. Public Interest — The head of an agency may determine that it is not in the public interest to utilize full and open competition for a particular procurement, but Congress must be notified not less than 30 days before award.³⁸ This exception was not in the House or Senate versions of CICA but was added by the Conference Committee.³⁹

8. Small Purchases — An implied exemption from full and open competition is contained in the CICA provision requiring "special simplified procedures" for small purchases which states that, for these procedures, the agency shall "promote competition to the maximum extent practicable."⁴⁰

9. Reprocurement Contracts — The Comptroller General has consistently held that, when a reprocurement is for the account of a defaulted contractor, the procurement statutes and regulations governing regular procurements are not strictly applicable, but competition should be obtained to "the maximum extent practicable."⁴¹

Basic Competition Requirements

Overview

Congress historically has established *goals* of competition and described general *methods* of obtaining competition (e.g., advance planning, market research, formal advertising, sealed bids, competitive proposals) but has left the specific requirements and "rules" of competition to the Executive Branch. The legislative history of both the Armed Services Procurement Act and the Federal Property and Administrative Services Act indicates that Congress felt it unusual and unnecessary to prescribe detailed and restrictive requirements that could be dealt with appropriately by administrative regulations.⁴² As discussed below, there have been a few "rules" added to the laws in recent years.

No real attempts have been made to evaluate the essential requirements of "competition." Certain elements or rules have been identified by the Comptroller General on a case-by-case basis, and some of these are included in the "rules" for sealed bidding⁴³ and competitive proposals⁴⁴ in the Federal Acquisition Regulation (FAR). When the Senate's version of CICA used "effective competition" as the standard (as opposed to "full and open competition," which was ultimately substituted by the House-Senate Conference Committee), the Senate Report said it was not amenable to rigid definition:

Although "effective competition" is not amenable to rigid definition, a description is important to establish the thrust of the legislation and the rationale for many of its provisions. Five components characterize "effective competition": (1) the information required to respond to a public need is made available to prospective contractors in a timely fashion; (2) the government and contractor act independently; (3) two or more contractors act independently to respond to a public need by offering property or services which meet that need; (4) the government has expressed its need in a manner which promotes competition; and (5) there is no bias or favoritism, other than required by law, in the contract award.⁴⁵

The Conference Committee substituted "full and open" competition to emphasize that *all* responsible sources should be permitted to submit bids or proposals.⁴⁶

Maximize Competition

There is one clear description from Congress of the scope of competition mandated by law — the maximum possible competition. This is evidenced from the legislative history of CICA,⁶⁷ the implementing procurement regulations,⁶⁸ and the bid protest cases interpreting the law and regulations.⁶⁹ The Comptroller General has stated that it is a "general rule of federal procurement" that specifications should be drafted in such a manner that "competition is maximized" unless a restrictive requirement is necessary to meet the Government's minimum needs.⁷⁰ CICA imposes a clear requirement that agencies undertake an *affirmative effort* to maximize competition.⁷¹ The one limitation on the scope of competition is the CICA provision permitting restrictive provisions or conditions, but only to the extent to satisfy the needs of the agency or as authorized by law.⁷²

One result of the requirement to maximize competition is that all offerors must be considered, and no responsible source can be *excluded* from the competition without justification.⁷³ The Comptroller General has repeatedly stated that he will give careful scrutiny to an allegation that someone has been denied the opportunity to compete for a particular contract.⁷⁴

The requirement to consider all responsible sources does not require an agency to delay a procurement until a particular vendor is able to compete. The requirement for full and open competition does not mean "that an agency must delay satisfying its own needs in order to allow a vendor time to develop the ability to meet the Government's requirements."⁷⁵ One reason there is no such requirement is that the law defines a "responsible source" as a prospective contractor who is able to comply with the required or proposed delivery or performance schedule.⁷⁶

Rules of Competition

One of the most basic requirements of any type of competition (sports, cards, artistic awards, etc.) is that there be rules and that the rules be enforced. Even in business and social relationships, there are "unwritten" rules to which people must conform in order to remain included in the group or avoid "penalties." As the type of competition becomes more sophisticated and the stakes grow larger, it is increasingly important that the rules of competition be adequately defined and uniformly enforced. When this does not occur, many participants simply drop out of the competition.

In government contracting, there is an inherent conflict between the desires of potential contractors and those of the Government. Potential contractors want very specific information regarding the Government's requirements and the rules of competition in order to decide whether or not to expend the time and effort and incur the cost of engaging in the competition. For their part, government agencies at least pay lip service to competition, but the actual users of supplies or services usually would prefer no competition at all and chafe at the rules and "red tape" of procurement procedures. The government users usually know the vendor they want or prefer, and describing their requirements adequately for competition in specifications or statements of work often is not a high priority (and, unfortunately, the technical people tasked with writing the descriptions usually are not on a career fast track). It is not surprising that specifications written around the product of a particular vendor are frequently developed. Nor is it surprising that government officials "split" a requirement to get below a specified dollar threshold for full competition.

One of the most basic principles of federal procurement law is that specifications must be sufficiently definite and free from ambiguity so as to permit competition on a common basis.⁷⁷ If specifications are ambiguous, competitors interpret them differently and, as a consequence, their bids or proposals are not comparable because their offers are made on a different basis.⁷⁸ *Indefinite* specifications also preclude real competition:

If bidders are invited to offer equipment varying from the specifications to some undefined extent, the bidders may loosely be said to be in a position of equality in that each may offer what he chooses, but there is totally lacking any basis for bidders to know what they are bidding for or against.⁷⁹

These principles also are implied by the statutory requirement that agencies specify their needs and develop specifications in a manner that permits full and open competition.⁸⁰ Even in acquiring commercial products, an agency is obligated to describe the item in a way that identifies the agency's needs with sufficient detail and clarity so that all vendors have a common understanding of what is required under the contract in order that they can compete intelligently on a relatively equal basis.⁸¹

Another fundamental rule of competitive procurements is that all offerors must compete on a common basis. Each competitor has the right to assume that the essential requirements of the solicitation are the same for all bidders or offerors.⁸² Competing on an equal basis encompasses the notion that vendors bid on the same terms, conditions, and specifications.⁸³ When an agency relaxes its requirements, either before or after receipt of proposals, it must issue a written amendment to notify all offerors of the changed requirements.⁸⁴ The statutory requirement that bids and proposals shall be evaluated, and awards made, solely on the factors specified in the solicitation⁸⁵ also reflects this concept. Also, an evaluation that incorporates more or less than the work that actually will be awarded fails to comply with the requirement for full and open competition.⁸⁶ Essentially, these rules mean that everyone should have an equal opportunity to compete for award of the contract.⁸⁷

The procurement statutes also now include "rules" requiring that all evaluation factors and subfactors, and the relative importance assigned to each, be included in solicitations for sealed bids and competitive proposals.⁸⁸ A new requirement in the Federal Acquisition Streamlining Act of 1994 (FASA) (discussed below) requires that requests for proposals disclose whether all evaluation factors (other than cost or price), when combined, are significantly more important, approximately equal to, or significantly less important than cost or price.⁸⁹ The statutes include a few very general provisions for opening bids, evaluating bids and proposals, and awarding contracts.⁹⁰

Perhaps the most important rule of government contract competition is that the Government must deal fairly and honestly with all offerors competing for federal contracts.⁹¹ One decision expressed this rule as a requirement that vendors receive impartial, fair, and equitable treatment.⁹²

Adequacy of Competition

The legislative history of CICA suggests the test for full and open competition is whether all qualified vendors are allowed and encouraged to submit offers and a sufficient number of offers is received to ensure that the Government's requirements are filled at the lowest possible cost.⁹³ The propriety of a particular procurement rests upon whether adequate competition and reasonable prices were received by the Government. In this connection, the Comptroller General has said regarding the exclusion of competitors:

An agency has satisfied CICA's full and open competition requirement when it makes a diligent good-faith effort to comply with the statutory and regulatory requirements regarding notice of the procurement and distribution of solicitation materials, and it obtains a reasonable price.⁹⁴

The test is whether a fair and reasonable price is obtained in response to the solicitation and not whether a lower price could be obtained if one or more competitors were given another chance.⁹⁵

Permissible Restrictions on Competition

General Authority

In addition to the statutory exceptions to the requirement for full and open competition discussed above, agencies may include *restrictive provisions or conditions* in their solicitations even where full and open competition is required to the extent necessary to satisfy the agency's needs.⁹⁶ One bid protest decision stated that all procurements involve inherent limits on competition because the use of performance or design specifications is, by definition, restrictive; therefore, the real rule is that specifications cannot be *unreasonably* restrictive.⁹⁷ The right to impose reasonable restrictions under the advertising requirements of Section 3709 was recognized as early as 1895 by the Comptroller of the

Treasury, who said that if the specialized supplies could not be obtained from ordinary dealers, it was permissible to "provide in the advertisement for such supplies that proposals will be limited to the class of people competent to furnish the character of articles required." "Where a solicitation includes requirements that restrict the ability of offerors to compete, the agency must have a reasonable basis for imposing the requirements."⁹⁹

When a solicitation is challenged as being unduly restrictive of competition, it is the procuring agency's responsibility to establish that the specification requirement is reasonably necessary to meet its minimum needs.¹⁰⁰ In such cases, the Comptroller General reviews the record to determine whether the requirement has been justified. The adequacy of the agency's justification is ascertained by evaluating whether the agency's explanation is reasonable, *i.e.*, whether it can withstand logical scrutiny.¹⁰¹ Stated another way, the issue is whether the restriction is "rationally premised and reasonable."¹⁰²

The Comptroller General does not weigh the advantages and disadvantages of the agency's chosen approach; his sole concern is whether the restrictions are reasonably necessary to meet the agency's minimum needs.¹⁰³ The Comptroller General has recognized that avoiding significant unnecessary delays or avoiding unnecessary duplication of costs may justify restrictions on competition.¹⁰⁴ If a rational explanation is not provided, however, the provision will be held unduly restrictive.¹⁰⁵ The remainder of this section will discuss major categories of circumstances in which restrictions on competition have been justified.

Approved Products

The procurement regulations describe three types of product prequalification that may be used to restrict competition in connection with solicitations for products; namely, qualified bidders list (QBL), qualified manufacturers list (QML), and qualified products list (QPL).¹⁰⁶ These involve the pre-testing of a product to demonstrate compliance with a specification requirement (which is not a responsibility issue of ability or capacity of an offeror requiring referral to the Small Business Administration if the product is not qualified).¹⁰⁷

A procuring agency may limit competition for the supply of parts if doing so is necessary to ensure the safe, dependable, and effective operation of equipment.¹⁰⁸ Such restrictions are permissible where doing so is necessary to ensure the procurement of satisfactory end products or the maintenance of a high level of quality and reliability necessitated by the critical application of a product.¹⁰⁹ The Comptroller General will, however, even review use of a QPL to determine whether the restriction is reasonable.¹¹⁰

There are special statutory procedures that must be followed if qualification requirements are imposed.¹¹¹ Agencies must provide offerors with a prompt opportunity to demonstrate their qualifications.¹¹² This includes informing potential offerors of the requirements that must be satisfied in order to become qualified.¹¹³ The agency also must ensure that an offeror is promptly informed as to whether qualification has been attained and, if not, promptly furnish specific information why qualification was not attained.¹¹⁴ An agency's failure to act upon a request for approval within a reasonable time deprives the offeror of a reasonable chance to compete and, therefore, is inconsistent with CICA's mandate for full and open competition.¹¹⁵ However, an agency is not required to delay a procurement in order to provide a potential offeror an opportunity to become approved.¹¹⁶

Bonding Requirements

Although bonding requirements may result in a restriction of competition, an agency may impose such requirements in appropriate circumstances as a necessary and proper means to secure fulfillment of the contractor's obligations.¹¹⁷ As a general rule, agencies are admonished against the use of bonding requirements in nonconstruction contracts, but the use of bonding is permissible where needed to protect the Government's interests.¹¹⁸ In reviewing challenges to bond requirements, the Comptroller General will merely look to see if they are reasonable and imposed in good faith.¹¹⁹ One area where the requirement frequently has been justified is where the agency states that the continuous operation of services is absolutely necessary.¹²⁰ Bonding requirements have been approved regardless of whether the

agency's rationale comes within the four reasons for a performance bond articulated in FAR § 28.103-2(a).¹²¹ The restriction on competition may be justified even where small business concerns¹²² and small disadvantaged businesses¹²³ may be excluded from competition because they are unable to obtain bonds.

Bundling and Total Package Procurements

Solicitations that combine or integrate separate, multiple requirements into a single contract are called bundled, consolidated, or total package procurements.¹²⁴ Such procurements have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement.¹²⁵ Accordingly, the Comptroller General will object to such procurements where a bundled contract or total package does not appear necessary to satisfy the agency's minimum needs.¹²⁶

One justification frequently used to consolidate requirements into a total package is the "single contractor" argument. Bundling has been upheld where a single contractor was required to ensure the effective coordination and integration of interrelated tasks or where procurement by means of separate acquisitions would involve undue technical risk or would defeat a requirement for interchangeability and compatibility.¹²⁷ Another example is where there is a need for a single prime contractor to be responsible for all phases of design, development, and testing.¹²⁸ A single contractor approach for the upgrade of a jet engine was justified on the basis that the Government's buying, storing, and issuing parts on an individualized basis would require excessive effort and would jeopardize the schedule and flow of engines through the government depot facility.¹²⁹ A single contractor approach also was upheld to ensure the effective coordination and integration of interrelated tasks, including the timely availability of components.¹³⁰ The Air Force even supported the need to integrate landscaping and construction requirements into one procurement to allow for "efficient and economical processing of the contract work."¹³¹

An agency's minimum needs include the need to procure supplies and services on the most cost-effective basis, and the possibility of avoiding unnecessary duplication of costs may justify consolidating several requirements under a total package approach.¹³² An agency's decision to procure under a total package approach was upheld in the absence of evidence that the approach did not ensure the most cost-effective method of procuring the items and when, in doing so, the agency avoided unnecessary administrative costs.¹³³ In appropriate circumstances, the agency's staffing resources can and should be properly considered in fashioning contracts that will satisfy the Government's minimum requirements at the lowest reasonable cost.¹³⁴ On the other hand, concern about incurring additional costs can justify restrictions on competition only in unusual circumstances, the existence of which must be clearly demonstrated. Generally, where an agency concludes that having separate contractors may lead to additional costs, the proper course is not to restrict competition, but rather to structure the solicitation evaluation criteria so as to take all costs into account.¹³⁵ However, in one case, the small size of an agency's contracting staff was held to justify the agency's combining electronic systems maintenance and operation, refuse collection, and janitorial services.¹³⁶

Other reasons used to justify bundling requirements include the need to ensure military readiness,¹³⁷ the need to avoid unacceptable periods of downtime for an emergency communications system during an upgrade and expansion effort,¹³⁸ and the need to combine educational services to provide for low enrollment areas and to provide for a complete program.¹³⁹ An agency should consider minor adjustments to its bundling of purchases if a protester shows that the structure of the package reduces competition and that it may cost the agency more money than the package will save because of the reduced competition.¹⁴⁰

Contractor Qualifications

The prequalification of *offerors*, as opposed to the prequalification of *products*, generally results in an unwarranted restriction on free and open competition.¹⁴¹ Nevertheless, under certain limited circumstances, the prequalification of offerors may be justified.¹⁴² One example is where an agency needs some assurance from a source independent of the bidder that a safety system (such as a fire

alarm) works. Thus, a requirement for certification by Underwriters Laboratory or Factory Mutual has been upheld.¹⁴³ The Comptroller General generally has not objected to a requirement for membership in an industry organization or a requirement that products conform to standards by a nationally recognized organization.¹⁴⁴ However, a requirement for a specific testing laboratory's seal of approval generally is considered unduly restrictive because prospective contractors should be permitted to present other credible evidence that their items conform to established standards.¹⁴⁵

An indirect form of prequalification is to impose specific responsibility-type requirements on offerors. For example, a solicitation requirement for a minimum of two years' corporate experience in providing family service functions was upheld as necessary to ensure high quality services.¹⁴⁶ Another solicitation requirement that certain key staff positions on cable ships be staffed by persons with experience aboard that type of ship also was upheld.¹⁴⁷ Any solicitation requirement stating a specific and objective standard to measure an offeror's ability to perform is called a "definitive responsibility criterion." An agency may include definitive responsibility criteria provided that the criteria reflect the agency's legitimate needs and the restriction on competition is reasonable.¹⁴⁸

Delivery Requirements

One of the best examples of a permissible restriction on competition involves the Government's required delivery for the supplies or services. A short delivery schedule is permissible so long as it reflects the Government's legitimate minimum needs. There is no requirement that an agency understate its minimum needs merely to increase competition.¹⁴⁹ The number of possible sources for an item or service does not determine the restrictiveness of solicitation provisions.¹⁵⁰ Consequently, even if only one firm can meet the delivery requirements, this does not establish that the agency's delivery schedule is not reasonably related to its minimum needs.¹⁵¹

Geographic Restrictions

An agency may restrict a procurement to bidders or offerors within a specified geographical area if the restriction is reasonably necessary for the agency to meet its minimum needs.¹⁵² One category of procurements in which such restrictions are applied involves the location of buildings for government offices. The Secret Service justified a restriction for its offices to a designated area with a central location in Houston near the Houstonian Hotel (the designated temporary residence of the President while in Houston) with easy access to major arteries to downtown, in a close proximity to the Houston Police Department, close to the Federal Building, and allowing for secured parking.¹⁵³ A restriction to an area near the courthouse was justified on the basis that Justice Department attorneys had to make several trips to the courthouse each day (with bulky files and boxes).¹⁵⁴ The Drug Enforcement Administration excluded the Canal Street area in New Orleans for its office on the basis that the area posed unacceptable security risks for its agents.¹⁵⁵ Government employee travel time has been held to be a legitimate consideration in determining an agency's minimum needs for office space.¹⁵⁶

The necessity for government employee travel also is a legitimate consideration in assessing an agency's need for geographic restrictions based on other considerations.¹⁵⁷ Restrictions have been upheld based on a demonstrated need for close liaison between agency personnel and the contractor and for close control over documents or data involved in a contract.¹⁵⁸ A geographical restriction was upheld because of the agency's operational need to improve efficiency by minimizing unproductive employee travel,¹⁵⁹ even if only to avoid traffic congestion in a highway tunnel.¹⁶⁰ Geographic restrictions for facilities serving military recruiting stations also have been upheld to increase efficiency, reduce the possibility of highway accidents, and improve the impression on military recruits.¹⁶¹ Travel time is not just a cost consideration. One protester argued that there were commonly used methods of determining travel cost that could be incorporated into the solicitation to increase competition, but the restriction was justified on the basis of quality assurance requirements and to avoid unproductive travel time during working hours.¹⁶²

Security

Military readiness and security considerations to meet possible wartime or emergency conditions is an actual need justifying restrictions on competition in appropriate circumstances.¹⁶³ One restriction which may be needed is a limitation to potential contractors with security clearances. The degree to which classified information must be protected by the use of certain security clearances is a matter within the discretion of the cognizant agency and will not be reviewed under the Comptroller General's bid protest function.¹⁶⁴ Potential competitors may object that the clearance level is too high, takes too long to obtain, or that the agency will not even initiate the application process until after award. The Comptroller General takes the position, however, that the fact that a requirement may be burdensome or even impossible for a particular firm to meet does not make it objectionable if it properly reflects the agency's minimum needs.¹⁶⁵

Standardization

The Comptroller General has recognized that, although there may be some restriction on competition, an agency may specify brand name components to be delivered as part of a system when the agency has a legitimate need for the specific brand.¹⁶⁶ One recognized agency need is to standardize equipment.¹⁶⁷ The need for standardization may involve sophisticated equipment, such as computer keyboards, in order to increase user friendliness and to eliminate time delays when operators must learn to operate new or different keyboards.¹⁶⁸ The need to standardize also may involve less sophisticated operations, such as welding.¹⁶⁹

Urgency

CICA requires that, even where urgency justifies limiting competition, the agency still must solicit offers from as many potential sources as is practicable under the circumstances.¹⁷⁰ Thus, an urgency determination does not itself justify a decision to award a sole source contract.¹⁷¹ The agency may limit the procurement to the only firm it reasonably believes can properly perform the work in the available time, provided the limitation is justified.¹⁷² Since the agency can limit the competition to firms with satisfactory work experience that it reasonably believes can properly perform the work, the agency is not even required to solicit the incumbent contractor if it reasonably doubts that the incumbent can perform the work.¹⁷³ A military agency's assertion that there is a critical need that has an impact on military operations carries considerable weight with the Comptroller General.¹⁷⁴

Other Restrictions

A solicitation restricted to modified commercial off-the-shelf equipment was justified by the agency's desire to avoid the risks of purchasing an unproven design.¹⁷⁵ An agency may require a firm seeking source approval to provide technical data from the original equipment manufacturer (even if the information is proprietary and difficult to obtain), so long as the data is reasonably necessary to evaluate the product.¹⁷⁶ Solicitations requiring products "compatible" with existing equipment are generally approved.¹⁷⁷ Even a specification requiring uniformity of appearance with the agency's previous acquisition was upheld.¹⁷⁸ An agency may specify items with superior performance characteristics allowing for as much reliability and effectiveness as possible.¹⁷⁹ Some cases hold that a restriction to new equipment,¹⁸⁰ or equipment with a maximum age, is permissible.¹⁸¹ At least two decisions, however, have held that a restriction to new equipment was not justified.¹⁸²

An interesting recent decision involved a solicitation for instructional services that required the contractor to be accredited from one of 10 accrediting associations. The protester contended the requirement overstated the Government's needs because the Army was not awarding degrees, giving academic credit, developing curricula, etc. The Army contended that the restriction was necessary to reduce unacceptable risks, such as uncertified teachers, nonexistent lesson plans, and substandard instructional material. The Comptroller General denied the protest.¹⁸³

Erosion of Competition and Purchasing Limitations

Contrary to the express purpose of CICA to *increase* competition, there has been a significant erosion of "real" competition in the last decade. A 1987 report by the General Accounting Office (GAO) reviewing DOD's compliance with CICA discussed awards *reported* by DOD as based on full and open competition but *actually* based on the submission of only *one* offeror.¹⁸⁴ In a follow-up audit three years later, GAO sampled awards reported as based on full and open competition and the submission of only one offeror and found that the agency had used practices inconsistent with full and open competition for one-half of the sample.¹⁸⁵ The attenuation of competition has a direct effect on increased costs to the Government because "the benefit of competition to both the government and to the public in terms of price and other factors is directly proportional to the *extent* of competition."¹⁸⁶

DOD has an entire program devoted to the shrinking availability of sources of supply and recently indicated that "diminishing manufacturing sources is a major potential problem."¹⁸⁷ A GAO report stated that DOD does not have systems that provide information on the magnitude and extent of the problem of diminishing sources but the examples listed of causes of the problem included only suppliers ceasing production, discontinuing distribution, or moving to a foreign country.¹⁸⁸ The fact that vendors may simply *choose* not to sell to the Government was not mentioned as a possible cause (although GAO did say that the private sector is increasingly more sensitive to its commercial customers rather than DOD).

In addition to the decline in the *amount* of competition, the *quality* of competition in government contracting has decreased in the last decade. The quality of competition has eroded, not because of the increased use of a particular *method* of competition (competitive proposals), but because of the failure to apply effective *rules* of competition to this method. Competition by sealed bidding has been recognized for over a century as a method of reducing costs, fraud, and favoritism. The reason this method is effective is that the *rules* of competition are fully disclosed (timely bids, responsive bids, evaluation factors, bid guarantees, etc.), there are objective standards for the competition, the bids are publicly opened to ensure the integrity of the system, and award is made to the low responsive bidder (with "responsibility" determined separately).

As discussed in this section, there are factors and circumstances currently associated with competitive proposals that are the antithesis to any form of competition; namely, indefinite or ambiguous goals (*i.e.*, products or services), undisclosed rules of competition, discretionary application of the rules, and discretionary enforcement of the rules. The presence of one or more of these factors or circumstances undermines competition and causes competitors to lose faith in the integrity of the system. When this occurs, as in any type of competition, many of the best competitors elect not to participate. *In most cases, a bad rule is better than no rule, and consistent application and enforcement of a bad rule often is better than discretionary application and enforcement of a good rule.*

Discretion and flexibility are desirable procurement goals in selecting different *methods* of procurement or evaluation factors for different circumstances, but discretion and flexibility in applying or enforcing the *rules* of competition to each method or evaluation factor are not. In sealed bidding, when you name the game, you disclose the rules. In competitive proposals, as discussed below, offerors do not know if the "game" is low price, best product, lowest risk, highest quality, etc. Government buyers prefer the "cafeteria plan" of source selection, *i.e.*, look at what is offered and then decide what is "wanted" and what can be purchased with the available funds. This method of selection not only has led to higher prices but also has seriously eroded one of the most basic historical limitations on government spending—the so-called "minimum needs" doctrine that has restrained unnecessary acquisitions for over 100 years. The factors and circumstances that have contributed to the erosion of competition and the limitation on government spending will be discussed in this section.

Specifications

It is a basic tenet of federal procurement law that specifications must be sufficiently definitive so as to permit competition on a common basis.¹⁸⁹ CICA and the FAR require that specifications be developed "in such manner as is necessary to obtain full and open competition."¹⁹⁰ This important and

specific statutory requirement (to do whatever is necessary) is almost *never mentioned* in bid protest cases. The Comptroller General has stated that, in addition to treating potential suppliers fairly, they should be informed "as fully as possible of what it is the Government needs."¹⁹¹ Competitors must be given enough information to know what they are competing *for* and what they are competing *against*.¹⁹² "Loose" specifications are similar to the poet Robert Frost's description of free verse—it is like playing tennis with the net down. Contracting agencies have the responsibility for drafting proper specifications.¹⁹³ The preparation of specifications and statements of work is a skill that is rarely emphasized or even recognized in the Government. (The development of courses of instruction for government personnel in this area might be the best "investment" the Government could make in cost reduction.)

It is a fundamental principle of procurement law that *ambiguous* specifications preclude competition on a common basis.¹⁹⁴ An ambiguity exists if the specifications are subject to more than one reasonable interpretation.¹⁹⁵ For example, a specification requirement for "first class material and workmanship" was not sufficiently definite because the phrase was subject to varying degrees of interpretation.¹⁹⁶ Specifications permitting different offerors to assume different requirements would improperly permit proposals to be prepared on different cost and technical bases.¹⁹⁷ Procuring agencies have argued that industry standards have not been developed and offerors should be permitted to propose whatever product they choose, but the flaw in the argument is that it permits each offeror to define the specification for itself and, to the extent that offerors do so differently, they are not competing on an equal basis.¹⁹⁸ Other government agencies make the equally erroneous decision to reject an offer that interprets the specification differently from the agency.¹⁹⁹ One impediment to convincing agencies that specifications and statements of work should be more definite is the Comptroller General's position that specifications need not be drafted in such detail as to eliminate all risk or remove every uncertainty.²⁰⁰

Precise design specifications describing how a product will be manufactured are not required. The Comptroller General has said, in fact, that design specifications "are generally inappropriate if an agency can state its minimum needs in terms of performance specifications which alternate designs could meet."²⁰¹ Performance specifications leave to the contractor the responsibility of choosing the means, methods, and techniques for accomplishing the contract work.²⁰² The Comptroller General has said he will not object to specifications that are "written around" design features of a particular item where the design specified is necessary to meet the agency's minimum needs,²⁰³ but that restricting a solicitation to a specific make and model does not meet the requirement for full and open competition.²⁰⁴

A major problem with ambiguous specifications is the risk placed on contractors. If specifications contain a patent or obvious ambiguity, the contractor is under a duty to inquire and seek clarification.²⁰⁵ The problem is the well-recognized "gray area" between when an ambiguity is obvious and when it is not.²⁰⁶ The critical issue is the degree of scrutiny reasonably required in reviewing specifications.²⁰⁷ The courts and boards of contract appeals necessarily have the advantage of 20-20 hindsight when deciding this issue (and have not experienced the pressures and time constraints in preparing bids or proposals). In competitive proposals, an offeror can "interpret" the specification in its proposal (shifting the burden of clarification back to the Government) and clarify issues in discussions. However, inadequate specifications always undermine competition, and this factor almost always is ignored in "reform" initiatives. It is a popular misconception that a low price means poor quality. If you are buying or selling gold and specify 98 percent purity, the price is irrelevant to quality if you *specify* the purity required, *inspect* to assure the product conforms, and *reject* any nonconforming products.

Undisclosed Evaluation Plan

Government agencies enjoy broad discretion in the selection of evaluation factors, and those factors and the evaluation scheme will be upheld so long as the criteria used reasonably relate to the agency's needs.²⁰⁸ As discussed above, the procurement statutes and regulations require that the evaluation factors and subfactors, and the *relative* importance assigned to each, be included in solicitations for bids and proposals.²⁰⁹ The Comptroller General has said it is "fundamental that offerors should be advised of the basis on which their proposals will be evaluated."²¹⁰ He has even released the source selection scoring plan in a bid protest case because it is "necessary to give the protesters a meaningful

opportunity to develop their protests."²¹¹ Nevertheless, the Comptroller General has consistently held that only the "broad scheme of scoring to be employed" need be disclosed to competitors in the solicitation.²¹² The precise scoring method to be used need not be disclosed.²¹³ These plans are internal agency instructions and, as such, do not give outside parties any rights.²¹⁴

Although the general rule is that an agency may not double count, triple count, or otherwise greatly exaggerate the importance of any listed evaluation factor,²¹⁵ the failure to disclose the evaluation plan poses a real problem in determining whether this will be done. For example, "experience" might be considered by the agency to be a legitimate consideration under a number of evaluation factors.²¹⁶ Likewise, "staffing" was found to be a legitimate consideration under several evaluation subfactors.²¹⁷ The failure to disclose the plan also may deprive competitors of the knowledge that bonus or penalty points will be used in scoring.²¹⁸ It is particularly difficult to understand how an evaluation plan can be upheld as satisfying the requirements for full and open competition when the undisclosed plan allocated points for performance *exceeding* satisfactory compliance.²¹⁹ In upholding an undisclosed point scoring plan involving a brand-name-or-equal solicitation, the Comptroller General said:

In a competitively negotiated brand name or equal solicitation, we consider unobjectionable comparative technical scoring where non-brand name equipment may receive a higher technical score than the brand name, if its performance is technically superior to the brand name. The solicitation here clearly put offerors on notice that offers would be comparatively evaluated on a point-scored basis, provided technical evaluation factors, and instructed offerors to indicate the extent to which the offered unit "meets or exceeds" the requirements. Consequently, we think it was unreasonable for the protester to assume that a proposal of the brand name would be scored equal to an offer possessing merit beyond the minimum requirements specified in the RFP. See *generally Computer Sciences Corp.*, B-189223, Mar. 27, 1978, 78-1 CPD ¶ 234. Thus, the fact that the protester may have been misled, while unfortunate, does not render the evaluation improper.²²⁰

Another problem in failing to disclose the evaluation plan is that competitors are unable to determine whether or not the plan will give the source selection official a clear understanding of the relative merits of proposals.²²¹ In one decision, the undisclosed evaluation plan had 10 separate evaluation factors with undisclosed point scores assigned to them for use by the evaluators. The undisclosed evaluation plan even reflected that the technical evaluators were to use a scoring guideline different from that to be used by the contracting officer, who was the source selection authority. The protest was sustained for other reasons, but disclosure of the evaluation plan initially in the solicitation could have resulted in amendments that would have avoided the issues.²²²

It is most difficult to understand why agencies are not required to disclose the scoring system to be used. Disclosure would eliminate the problems of determining the *relative* importance of evaluation factors for disclosure and the problems that will be caused by the new requirement in FASA (discussed below) to disclose when factors are "significantly" more or less important than cost. If the scoring system is valid, it should result in the Government receiving proposals more closely responsive to what it wants. If "technical" is rated 90 percent and cost is rated 10 percent, proposals will be structured in an entirely different manner than they will be if cost is 90 percent and technical factors are rated 10 percent. The only reasonable explanation is that the agencies want to use the "cafeteria plan" selection method of waiting to see what is offered before deciding on the definite scoring. The failure to disclose the evaluation method has an obvious and adverse impact on competition. By analogy to football, it is like having a tie game with one play left and you do not know how many points you will get if you score by running the ball, passing, or kicking a field goal. The Government will get much more "responsive" proposals if it discloses the scoring system.

The writer actually experienced this problem in trying to convince the chief procurement officer of a local public agency in the Dallas area to disclose the ratings to be used in evaluating the systems offered by competitors. After vague and indefinite answers, the writer asked, "Who knows what the scoring system will be?" The answer was: "Only the Shadow knows."

Undisclosed Evaluation Factors

Undisclosed evaluation *plans* prevent competitors from knowing how evaluation *factors* will be scored. Another significant reason that competition has been eroded is that government agencies do not disclose all of the evaluation factors and subfactors that will be scored or otherwise considered in the evaluation. This problem exists notwithstanding an absolute, unequivocal mandate from Congress that such factors be disclosed in solicitations.

Congress first required disclosure of evaluation factors in CICA, which requires solicitations to include "all significant factors (including price) which the executive agency reasonably expects to consider" in evaluating competitive proposals and their relative importance.²²³ This provision was implemented in Federal Acquisition Circular 84-5 by providing, in FAR § 16.605(e), that solicitations clearly state the evaluation *factors* and any significant *subfactors* that will be considered in making source selections and their relative importance.²²⁴ The Comptroller General's interpretations, however, emasculated the requirement by holding that agencies did not have to disclose areas or matters that were reasonably related to or encompassed by the disclosed criteria.²²⁵ With respect to subfactors, the Comptroller General held that agencies did not have to disclose subfactors if they were "sufficiently related to the stated criteria so that offerors would reasonably expect them to be included in the evaluation" ²²⁶ or were "reasonably related" to the stated criteria and the "correlation is sufficient to put offerors on notice of the additional criteria to be applied." ²²⁷ The Comptroller General did not require evaluation subfactors to be revealed to competitors even in bid protest cases.²²⁸

Industry complained to the House Armed Services Committee that DOD often did not state evaluation factors and that it was difficult to understand what the Government really wanted. This resulted in an amendment to the Armed Services Procurement Act to expressly require that solicitations include a statement of all significant evaluation *subfactors* the agency expects to consider.²²⁹ The committee report accompanying the bill said:

In reviewing this issue the committee became cognizant of an issue that it also believed warranted attention—the quality of the department's statement in the solicitation of the factors on which it will base its source selection decision. Industry complained that the evaluation factors were often not stated or were not sufficiently detailed to allow offerors to understand what the department truly considered important. Without that knowledge they were left to structure offers that were often not consistent with the department's needs. The department, on the other hand, was concerned that if it were required to state in the solicitation the evaluation criteria, including all subfactors, and the weights that would be given those factors, the government would lose flexibility in choosing the best offer, and the subjective judgments it is often required to make would be challenged.

The committee cannot stress enough the importance of the solicitation containing clear and unambiguous descriptions of each significant evaluation factor *and* its relative importance. This becomes even more significant if the department intends to award without discussion. The committee believes it can resolve both the industry and DOD concerns by amending section 2305 of title 10, United States Code, to require the department to include in its solicitations a statement of not only all significant evaluation factors, but all significant subfactors as well. Finally, it recommends an amendment to provide that in prescribing the evaluation factors, the department must clearly establish the relative importance of the factors included in the solicitation. The committee encourages the department to provide as much detail as possible in describing the significant evaluation factors and subfactors.²³⁰

The Comptroller General recognized that this meant the solicitation should contain "clear and unambiguous information concerning how offers will be evaluated." ²³¹

The Comptroller General, however, continues to hold that factors "encompassed by or related to,"²³² or "which might be taken into account"²³³ in evaluating, identified criteria need not be disclosed. With respect specifically to the disclosure of evaluation subfactors even by DOD agencies, the Comptroller General's position is that areas reasonably related to or encompassed by,²³⁴ or "intrinsically related to,"²³⁵ the stated criteria do not have to be disclosed in the solicitation. Thus, the Comptroller General held that "risk" did not have to be disclosed as an evaluation factor or subfactor because consideration of risk is *inherent* in the evaluation of proposals.²³⁶ The logical refutation of this position is that, under this view, subfactors *never* would have to be disclosed. *All* subfactors, by definition, are reasonably related to or encompassed by the primary factors (otherwise, they would not be *subfactors*).

The General Services Administration Board of Contract Appeals (GSBCA) takes a different view of the disclosure requirements. In sustaining a protest in which the Marine Corps did not disclose it was evaluating whether, and how much, an offeror's proposal *exceeded* the Government's needs (and to which a dollar value was assigned), the Board said:

The Board has held that any factor which significantly contributes to how a potential offeror structures its proposal or which affects the selection of an awardee should be disclosed in the solicitation. *Systemhouse Federal Systems, Inc.*, GSBCA 9313-P, 88-2 BCA ¶ 20,603, at 104,122, 1988 BPD ¶ 33, at 13. The fact that SAC would be examining the technical proposals to determine whether they exceeded the requirements of the solicitation and would be assigning a dollar value to those elements is such a significant factor. Offerors may structure their proposals differently and may include additional features in their proposals based on this knowledge. The proposal an offeror submits based on the terms of this solicitation could be markedly different than the proposal which may have been submitted if the evaluation factors and cost savings adjustment had been disclosed. Thus, the fact that proposals would be examined to determine if they exceeded the requirements of the solicitation and the fact that a cost savings adjustment would be applied to those elements which exceeded the requirements should have been disclosed in the solicitation.²³⁷

The GSBCA's statement explains clearly how competition has been eroded by the failure to apply one of the most basic rules of competition; namely, stating *what* will be scored. It also should be clear that the procuring agencies are depriving themselves of higher quality proposals by failing to disclose all evaluation factors and subfactors. The awardee under the present system may merely be the offeror who had the best guess (or, worse, inside information) about what the Government *really* wanted. One of the best expressions of this argument was made by the Comptroller General in a case in which the statutory requirement to disclose evaluation factors was inapplicable:

Intelligent competition assumes the disclosure of the evaluation factors to be used by the procuring agency in evaluating offers submitted and the relative importance of those factors.²³⁸

The current practices, it is submitted, are inconsistent with "intelligent competition."

Subjective and Unnecessary Evaluation Factors

One of the most important measures of the *quality* of competition is the *objectivity of the scoring*. There almost never is any doubt regarding the winner of a marathon race or a pole vault competition. What distinguishes these sports from professional wrestling? The answer is *rules and their enforcement*. The integrity of the competition is directly proportional to the objectivity of the scoring method. The less objective the scoring method, the more opportunity there is for the mischief that competition is intended to avoid (favoritism, fraud, overspending, etc.). The integrity of the competition requires *not only* that the judges are satisfied with the winner *but also* that the competitors believe that they have been treated fairly.

The quality of competition in government contracting has eroded due to the increased *number* as well as the increased *subjectivity* of evaluation factors. Subjective scoring permits the judges to postpone

deciding what they want until after the competitors have completed their participation. This, again, is the "cafeteria" selection method—you do not decide what you want until you go down the line with your tray. This selection method has a major flaw—we all tend to buy too much when we go through the buffet line. The same is true in government contracting; subjective evaluation permits the Government to pay more for what it purchases (under the euphemism of "best value," discussed below). When non-cost factors are evaluated along with price, a higher score in subjective factors costs the Government more money.

The Comptroller General has held that subjective evaluations are not improper; evaluation factors need only reflect the agency's actual needs.²³⁹ A legitimate question, however, is whether many of the subjective evaluation factors currently being used in federal source selection really reflect the Government's actual needs. One offeror was downgraded because its proposal did not show any "creative or innovative thoughts,"²⁴⁰ and competitors in another procurement were rated for their "visionary" approaches.²⁴¹ In another competition, proposals were graded by the offerors' "academic credibility."²⁴² Proposals often are evaluated for the offerors' labor-management relations. One was downgraded in this area because the evaluators reported "several employees were disgruntled because [the offeror] refused to timely grant cost of living wage increases."²⁴³ Another proposal was downgraded for containing insufficiently detailed strike/work stoppage procedures.²⁴⁴ Proposals frequently are graded for the "oral presentation."²⁴⁵ One proposal was found unacceptable because of the contractor's organizational chart.²⁴⁶ A company's plans for quality control also frequently are evaluated,²⁴⁷ and the Comptroller General has recognized that different evaluators will have different perceptions regarding the relative merits of proposed quality control plans.²⁴⁸ However, when a proposal's quality control program is downgraded for an *undisclosed* requirement to include the Government's participation in the quality program, a more objective evaluation method is needed,²⁴⁹ particularly where the evaluation plan assigns more weight to quality than to price.²⁵⁰ Objective criteria are particularly important to describe the Government's actual needs in connection with the evaluation factor of customer satisfaction²⁵¹ (*i.e.*, how much "satisfaction" is enough).

It may be impossible, or at least undesirable, to eliminate subjectivity in all competitive acquisitions, such as the "aesthetic" evaluation factor for the design of a building²⁵² or the "visual impact" consideration for the design of a bridge.²⁵³ However, some rules, standards, and guidelines for the use of subjective standards (none of which exist today in government procurement) should be established describing the types of factors permitted and the discriminators to be used in scoring. To analogize, there is subjectivity involved in evaluating gymnastics and diving competitors, but there are well-defined factors that are being evaluated and which are well known to all competitors.

Another reason competition in government procurement has eroded is that proposals are evaluated on the basis of factors that are remote to justifiable actual needs of the agencies. Comparative evaluations of a potential contractor based on the vesting period for its employees' 401(k) plan contributions,²⁵⁴ the employee sick leave policy,²⁵⁵ the part-time or full-time status of employees,²⁵⁶ severance pay policy,²⁵⁷ government contract experience,²⁵⁸ the importance of the contract to the offeror,²⁵⁹ and membership in professional organizations²⁶⁰ seem hard to relate to the Government's actual needs. A comparative evaluation of offerors' minority business participation²⁶¹ can result in the Government paying a hidden price premium for socioeconomic programs. It also is doubtful that Congress recognizes that agencies may be paying a price premium in janitorial services for the contractor's corporate reputation, supervisor experience, organizational methods and techniques, and subcontracting plans.²⁶²

Some government requirements and evaluation factors may be imposing standards on government contractors that the Government does not, or could not, adopt for itself, such as employee dress and grooming standards,²⁶³ employee personnel conduct and attire,²⁶⁴ availability of conference room space,²⁶⁵ pop-up dispensers for paper towels,²⁶⁶ subsidized hot meal and beverage programs for employees,²⁶⁷ and even evaluation of employees' political views.²⁶⁸ Awarding government contracts based even in part on highly subjective, and possibly unnecessary, factors erodes and undermines competition for what the Government actually needs. Government requirements based on personal preferences are inappropriate.²⁶⁹

Responsibility-Type Evaluation Factors

In government contracting, the term "responsible" as applied to a prospective contractor has a well defined and consistently applied meaning; namely, a contractor that can and will perform the contract satisfactorily. To be "responsible," a prospective contractor must (a) have adequate financial resources or the ability to obtain them, (b) be able to comply with the delivery or performance schedule, (c) have a satisfactory performance record, (d) have a satisfactory record of integrity and business ethics, (e) have the necessary organization, experience, accounting and operational controls and technical skills, or the ability to obtain them, (f) have the necessary equipment and facilities, or the ability to obtain them, and (g) be otherwise qualified and eligible to receive award.²⁷⁰ Responsibility determinations are made *after* preliminary source selection (i.e., determination of low bidder or best evaluated proposal) and are a condition to all government purchases.²⁷¹ A prospective contractor must affirmatively demonstrate its responsibility, including (when necessary) the responsibility of its proposed subcontractors.²⁷²

An agency's consideration of the technical merits or acceptability of proposals traditionally has been separate and distinct from consideration of an offeror's responsibility.²⁷³ However, the Comptroller General said:

It is not always possible to draw a distinct line between the two concepts because often traditional responsibility matters are incorporated into technical evaluation criteria used in negotiated procurements, and where an agency uses traditional responsibility criteria to assess technical merit or acceptability, the technical evaluation may involve consideration of an offeror's capability as well as its proposed approach and resources.²⁷⁴

Nevertheless, the solicitation must advise offerors that traditional responsibility criteria will be *comparatively* evaluated.²⁷⁵

Examples of responsibility-type factors that have been used for *comparative* evaluation in source selection include (1) financial capability,²⁷⁶ (2) production capability,²⁷⁷ (3) facilities,²⁷⁸ (4) equipment,²⁷⁹ (5) staffing,²⁸⁰ (6) purchasing system,²⁸¹ (7) production techniques,²⁸² (8) delivery schedule,²⁸³ (9) schedule realism,²⁸⁴ (10) business practices,²⁸⁵ (11) safety,²⁸⁶ (12) spare parts availability,²⁸⁷ (13) knowledge of local law,²⁸⁸ and (14) warranty.²⁸⁹

Two responsibility factors are particularly troublesome. The first is "corporate experience." It causes problems because the evaluation sometimes is limited to the corporate entity²⁹⁰ while at other times it includes consideration of the corporation's officers and key personnel²⁹¹ and even subcontractors.²⁹² The second problematic responsibility factor is "risk." Solicitations sometimes delineate specific types of risk to be evaluated (e.g., management, operational, technical, cost, and performance).²⁹³ The Comptroller General holds, however, that risk is inherent in all evaluations of technical proposals.²⁹⁴ Therefore, evaluation of risk is permitted in the same procurement as a separate evaluation factor and as a consideration in evaluating other factors.²⁹⁵ Since "risk" has a negative value, another problem with this factor is how to evaluate the probability of negative events.²⁹⁶

The use of responsibility-type evaluation factors erodes competition and purchasing limitations by raising critical issues for both potential contractors and the Government. For potential vendors, the issue is "how much is enough?" Is this procurement worth the time, effort, and cost to compete? Will my financial resources, facilities, etc., be compared with those of General Motors, IBM, etc.? For the Government, an issue *should* be "how much is too much?" Will an offeror's \$50 million in financial resources justify paying a price premium for janitorial services when compared with a proposed contractor with only \$5 million in resources? There may even be a scale of points based on years of experience.²⁹⁷ However, the issue is not how much the experience should be scored but how much is more than "enough." One proposal was rated superior partly because the offeror had 100 years of corporate experience.²⁹⁸ In addition, there is always the question of whether the offeror had 10 years of experience or merely one year's experience 10 times. Competition is prejudiced because there is no statutory or regulatory guidance to limit the evaluation of responsibility factors to the amount or level

that is *adequate* for the performance of the contract. As the Comptroller General said when a protester claimed its superior financial condition deserved a higher score:

The Navy did not rate [the protester's proposal] superior because, it explains, "it is hard to envision, let alone quantify, any added benefit to the agency resulting from massive revenues; [o]nce the financial condition and capability of an offeror is deemed to be sufficient to support performance of the contract, a rating of 'acceptable' is entirely appropriate."²⁹⁹

When the problem is raised, the Comptroller General points out that Congress has specifically recognized in 10 U.S.C. § 2305(a)(3) and 41 U.S.C. § 253a(c) that responsibility-related factors, such as management capability and prior experience, are appropriate considerations in assessing the quality of proposals.³⁰⁰ However, these laws do not say the evaluation may be entirely subjective with no limitation to "adequacy."

Exceeding Government Requirements

Another circumstance that has had an adverse effect on competition and government purchasing limitations is that evaluation points are awarded for *exceeding* the Government's requirements set forth in the solicitation. The practice sometimes is expressed as little more than a differentiation that awards a higher score to a proposal that exceeds the minimum requirements than to one that merely meets the requirements.³⁰¹ The "cafeteria selection" nature of this approach was described as follows:

We do not think that it is necessary or even practicable to assign specific weights in a solicitation to enhancements, the nature of which the agency cannot be aware of until they are actually proposed by an offeror. It is our view that such enhancements should be evaluated under the appropriate evaluation factor or subfactors in the solicitation and assigned the weight in the overall evaluation commensurate with the weight given to the factor or subfactor in the solicitation's evaluation scheme. Our view of the record indicates to us that this was done here.³⁰²

Solicitations sometimes advise competitors that their proposals will be given points for exceeding the requirements.³⁰³ In other cases, the Comptroller General has held that the mere fact that the solicitation provides for comparative judgments of technical evaluation criteria is notice that an agency may rate one offeror higher than others for exceeding the requirements.³⁰⁴ At other times, the source evaluation plan provides that points are earned only if a critical part exceeds the technical specifications.³⁰⁵ Occasionally, the Comptroller General will hold that it is improper to award higher points for exceeding the requirements.³⁰⁶ The practice is common, however, and examples of awarding higher scores for exceeding the solicitation requirements include performance capability,³⁰⁷ equipment,³⁰⁸ additional personnel,³⁰⁹ and organization and staffing.³¹⁰

Competitive evaluations that award points for exceeding the Government's requirements raise real questions as to whether there is genuine competition at all. It is difficult enough to compete to *meet* the requirements, but with undisclosed evaluation plans, undisclosed and subjective evaluation factors, etc., how can there be any meaningful competition to *exceed* the requirements? How much more than the requirements is desired (and will be awarded points)? In what areas are additional performance or capabilities desired? What will you be competing against? Finally, how can the Government justify paying a higher price for something that exceeds its actual needs as reflected by the specification requirements?

Best Value Procurements

The label "best value" procurement, although much in vogue today, neither broadens nor narrows the discretion agencies always have exercised in conducting cost/technical tradeoffs.³¹¹ The practice sometimes is called "greatest value."³¹² Essentially, it merely means that there is no requirement that the contract be awarded based on the low price,³¹³ and this subject could constitute a completely

separate topic for discussion.³¹⁴ The evaluation may be based on dividing the technical evaluation point score by the total proposed price to obtain a price/quality ratio.³¹⁵ This practice was a standard technique used in the Navy's technical evaluation manual for turnkey family housing at least as early as 1975.³¹⁶ Another "best value" evaluation factor also much in vogue today is "past performance." This topic likewise is too broad to cover here³¹⁷ and has many inherent problems, risks, and effects on competition. Past performance expressly contemplates paying a price premium based on evaluation of the types of factors previously discussed in this article.

The only illustration of the potential impact of this method on competition and purchasing limitations will be a hypothetical example of a solicitation by the General Services Administration for automobiles for the GSA motor pool. If the solicitation were issued on a "best value" basis with "technical" (defined as engineering, appearance, comfort, and warranty) rated 70% and cost 30%, it is possible that a Cadillac could win over a Ford or Chevrolet. This result would not mean, however, that the Government actually *needs* this higher cost transportation.

Impact on Small Business Concerns

One of the most serious erosions of competition (and perhaps the most subtle) has been the adverse impact of current procurement practices on small business concerns and minority enterprises. No small business concern may be precluded from award because of *nonresponsibility* without referral of the matter to the Small Business Administration (SBA) for a final determination (and *possible* issuance of a certificate of competency).³¹⁸ Application of responsibility-type evaluation factors on a pass/fail or go/no go basis that results in the elimination of a small business concern from competition without referral of the matter to the SBA is improper.³¹⁹ However, a proposal from a small business concern may be rejected as unacceptable based on a relative assessment of responsibility-type factors *without* a referral to the SBA.³²⁰

It is relatively easy, therefore, to eliminate small business concerns from competition merely by including responsibility-type evaluation factors in the solicitation and then comparing the small business concern's capabilities with much larger, more experienced companies (even if the greater capabilities or resources of the large businesses exceed the Government's actual needs). Examples of the *comparative evaluations* of responsibility-type factors that have resulted in small business concerns and minority enterprises being eliminated from competition for government contracts include (a) corporate experience,³²¹ (b) corporate resources,³²² (c) management capability,³²³ (d) production capability,³²⁴ (e) staffing for cost tracking and control,³²⁵ (f) personnel experience,³²⁶ (g) personnel qualifications,³²⁷ (h) demonstrated expertise and capability,³²⁸ and (i) management and staffing.³²⁹ It bears noting that, in *not one* of these decided cases was a determination made that the small business concern was not capable of performing the contract satisfactorily. Rather, in each case someone else was *more* capable.

In recognition of the shaky ground on which the application of responsibility-type evaluation factors to small business concerns rests, agencies have been instructed how to structure the solicitation to avoid referrals to the SBA. The recent *Guide to Best Practices for Past Performance* issued by the Office of Federal Procurement Policy (Interim ed. May 1995) states at page 12:

To make clear from the outset that past performance is being used as an evaluation factor, it should be included in the solicitation as a factor against which offerors' relative rankings will be compared. Agencies should avoid characterizing it as a minimum mandatory requirement in the solicitation. When used in this fashion—to make a "go/no go" decision as opposed to making comparisons among competing firms—it will be considered part of the responsibility determination. As such, it will be subject to review by the Small Business Administration under the Certificate of Competency process.

The effective elimination of small business concerns from competition excludes numerous qualified competitors and creates a subtle restriction on competition to larger, over-qualified competitors without

justifying that such a restriction is necessary to meet the Government's actual needs. Responsibility-type evaluation factors also favor the large businesses that already have the facilities, financial resources, etc., over the small business concerns that only have the "ability to obtain" them, as permitted under responsibility determinations.³³⁰

Previous administrations and congresses have wrestled with the problem of inducing government agencies to contract with small business concerns. In a memorandum for the Defense Secretary dated Feb. 6, 1961, President John F. Kennedy said:

I note that Congress has once again criticized the Department of Defense for not giving more contracts to small business. This is an old complaint. I think it would be useful for you to have someone look into exactly how this is handled and whether it is possible for the Defense Department to put more emphasis on small business. If it isn't possible for us to do better than has been done in the past I think we should know about it. If it is possible for us to do better we should go ahead with it and I think we should make some public statements on it. Would you let me know about this? ³³¹

The most discouraging aspect of this problem is not that small business firms do not get the contracts but, rather, that the taxpayers are deprived of the benefit of the lower prices that presumably would result from their competition in the contracting process.

The Minimum Needs Doctrine

For over 100 years, one of the most significant restraints on government purchasing has been the so-called "minimum needs" doctrine. The restraint is grounded in the basic authority of the Government to make any purchases or contracts. All contracting authority of the Government must be derived from one of two possible sources; namely, (1) a statute expressly authorizing a contract to be made (a contract authorization act, which is rarely used), or (2) an appropriation of funds from which the authority to contract can be *implied* (which accounts for over 99% of all government purchases). This rule was explained in an 1897 decision of the Comptroller of the Treasury as being based on Section 3732 of the Revised Statutes, which stated that no contract or purchase could be made unless the same is authorized by law or is under an appropriation adequate for its fulfillment.³³² However, the *implied* authority extends only to expenditures which are necessary or incident to the purpose of the appropriation.³³³ The theory is that it cannot be *implied* that Congress *intended* to confer authority to contract for more than the Government's *needs*. Indeed, the principle of law is that "a legal contract cannot be made now for articles the Government does not need."³³⁴ This rule, therefore, was expressed as providing that the Government can only buy what it actually *needs*, not what it wants or *desires*.³³⁵

The rule was stated by the Comptroller General as follows:

It has long been the rule, enforced uniformly by the accounting officers and the courts, that an appropriation of public moneys by the Congress, made in general terms, is available only to accomplish the particular thing authorized by the appropriation to be done. It is equally well established that public moneys so appropriated are available only for *uses reasonably and clearly necessary to the accomplishment of the thing authorized* by the appropriation to be done.³³⁶

(Emphasis added.) Likewise, there is no authority, under the doctrine, to include any provision in government contracts that is not *essential* to the accomplishment of the purpose of the appropriation under which the contract was made.³³⁷ The Government's "needs" were required to be obtained at the "most reasonable prices obtainable."³³⁸ Applying the doctrine, the Comptroller General held that requirements for automobiles with leatherette upholstery³³⁹ and four camshaft bearings³⁴⁰ exceeded the Government's minimum needs.

There still is an Anti-Deficiency Act,³⁴¹ which provides that an officer or employee of the Government cannot make contracts before an appropriation is made unless authorized by law. Without

a contract authorization act, the Government's authority to contract is still *implied* from the appropriation. The limitation to contracting only for the Government's *minimum* needs is included in the procurement regulations.³⁴² A contracting officer was quoted in one bid protest decision as referring to the "old adage" that the Government drives Chevrolets, not Cadillacs.³⁴³

The failure to apply the minimum needs doctrine has led to sharply reduced competition and erosion of the historical purchasing limitation. How has this occurred? The primary reason is that there is no effective way to "police" the limitation. The Comptroller General consistently holds that the contracting agency has the primary responsibility for determining its minimum needs and for determining whether an offered item will satisfy those needs.³⁴⁴ This is described as *broad* discretion.³⁴⁵ It is virtually impossible to challenge an agency's determination of its minimum needs in a bid protest environment. This has led to anticompetitive practices of undisclosed evaluation plans, undisclosed evaluation factors, proposals exceeding the solicitation's requirements, and comparative evaluation of responsibility factors. Failure to enforce the rule permits the Government to require services exceeding the standards in the private sector, such as a two-hour response time for Air Force housing for breakdown of air conditioning,³⁴⁶ and clean shirts and pants every other day, personally tailored to the individual employee.³⁴⁷

Source Selection

The source selection process also undermines competition in contracting by the absence of rules, effective standards or practical enforcement. The process begins with the agency's source selection *plan*. As discussed above, agencies are not required to *disclose* the evaluation plan to competitors. In addition, the agencies are not *bound* by their own source evaluation plan because the plans are internal agency instructions and, as such, do not give outside parties any rights.³⁴⁸ Even when the evaluation plan stated the evaluation would be performed by a "team" but actually was done by the chairman alone, the Comptroller General held there was no basis for questioning the award.³⁴⁹ Likewise, the qualifications of the evaluators are not subject to challenge (absent fraud, bias, or conflict of interest) because their selection is within the discretion of the agency.³⁵⁰ One decision stated:

We observe that even if protester were able to establish with a preponderance of the evidence that the evaluators harbored a hidden favoritism towards Integraph, that alone would provide no basis for sustaining a protest at this time. We are all to some extent the product of our experiences and that alone hardly should be a sufficient basis for finding prejudice. So long as the evaluators are knowledgeable and professionally qualified — there is no allegation to the contrary — and fairly conduct their evaluations in accordance with valid criteria provided to them, it is irrelevant that circumstances beyond their control have provided them with a preponderance of experience with the equipment of one competitor.³⁵¹

Challenges to the technical *qualifications* of evaluators will not be considered,³⁵² even when non-doctors were evaluating physicians.³⁵³ In fact, the entire composition of the evaluation panel is within the agency's discretion.³⁵⁴ The Comptroller General also recognizes that the individual evaluators have "disparate, subjective judgments on the relative strengths and weaknesses of a proposal,"³⁵⁵ but this does not indicate that the evaluation was flawed.³⁵⁶ The evaluators' point scores are not binding on the source selection official;³⁵⁷ they are "merely aids for selection officials."³⁵⁸ Even the scoring *method* in the evaluation plan is not binding on the source selection official.³⁵⁹

Source selection officials have "wide discretion" and are bound neither by the technical scores nor the source selection recommendations of the technical evaluators.³⁶⁰ They have broad discretion in determining the manner and extent to which they will make use of technical and cost information and are subject "only to the tests of rationality and consistency with the established evaluation factors."³⁶¹ This means they are not bound even by the conclusions of the technical experts.³⁶²

The risk of this almost absolute discretion (subject only to consistency with the disclosed factors in the RFP, fraud, etc.)³⁶³ is that there is no real "competition" when rules are neither *disclosed* nor

followed. It is hard to defend this process as true "competition" when the rules are not disclosed, are applied secretly, and are not binding when decisions are challenged. Source selection is an excellent example of where a bad rule may be better than no rule. As stated in one decision, the source selection authority was "proud to be known throughout the Defense Department for 'going by the book,' but apparently the book he goes by is not the FAR."³⁶⁴ The mischief that can occur under this process could not be illustrated better than by the recent decision of the Eleventh Circuit in *Latecoere International, Inc. v. United States*³⁶⁵ describing the "cheating" and "cooking the books" that had occurred in the improperly motivated manipulation of the evaluation ratings even though a bid protest previously had been denied by the Comptroller General.

Bid Protests

The general scope, benefits, and shortcomings of the bid protest system are beyond the scope of this article. The point will be made only briefly that *the bid protest system cannot establish effective rules of competition and, under the current rules, cannot enforce effective rules of competition.* The discretion granted to agencies in the selection process precludes an effective policing system. The Comptroller General, for example, generally reviews agency decisions in the source selection process only to see if they have any reasonable basis and are consistent with the solicitation. This standard of review applies to determining requirements,³⁶⁶ minimum needs,³⁶⁷ evaluation of proposals,³⁶⁸ cost/technical tradeoffs,³⁶⁹ the source selection decision,³⁷⁰ and conflicts of interest.³⁷¹

The Comptroller General's standards of review are even more difficult to overcome in decisions involving other issues, like composition of the evaluation board (requiring fraud, bad faith, conflict of interest, or actual bias),³⁷² bias (requiring convincing evidence of specific and malicious intent to injure the protester),³⁷³ and bad faith (requiring virtually irrefutable evidence that the agency had specific and malicious intent to injure the protester).³⁷⁴

The standard of review of the GSBGA is broader because its review is *de novo*.³⁷⁵ The GSBGA applies the same standard as it does to contracting officers' decisions under contract disputes procedures.³⁷⁶ It will review information that was not available to the contracting officer.³⁷⁷ Nevertheless, the Board has consistently held that, where the solicitation does not set forth specific weights to be applied in conducting cost/technical tradeoffs, agencies are accorded "great discretion" in determining which proposal is most advantageous to the Government.³⁷⁸ Reviewing courts also recognize that contracting officers are entitled to exercise discretion upon a broad range of issues in source selection.³⁷⁹ The point of this brief discussion is that the fundamental problems in eroding competition and purchasing limitations cannot be solved merely by modifications to the bid protest system. Congress must prescribe—or require agencies to prescribe—the rules, standards, and practices to obtain true competition.

Proposals to Limit Competition Requirements

Procurement Reform

There are several "procurement reform" proposals pending in Congress that would limit full and open competition. An analysis of these proposals is beyond the scope of this article. However, the proposals will be mentioned in this section with a few brief comments regarding the proposals as they may relate to the material discussed above. The current procurement reform proposals are directed toward having the Government adopt some of the purchasing practices used in the commercial marketplace. This reform movement began with Vice President Gore's *Report of the National Performance Review* issued on Sept. 7, 1993.³⁸⁰ The Report said that the Government frequently purchases low-quality items, or even wrong items, that arrive too late or not at all. The Report concluded by saying that federal managers can buy 90 percent of what they need over the phone, from mail-order discounters.

The Administration's point person on this reform is Steven Kelman, Administrator of the Office of Federal Procurement Policy (OFPP). Mr. Kelman was a professor of public policy at Harvard University before his appointment to his current position. His views were expressed succinctly in his book, *Procurement and Public Management*, published before he took his current position.

I, too, believe that the government often fails to get the most it can from its vendors. In contrast to the conventional view, however, I believe that the system of competition as it is typically envisioned and the controls against favoritism and corruption as they typically occur are more often the source of the problem than the solution to it. The problem with the current system is that public officials cannot use common sense and good judgment in ways that would promote better vendor performance. I believe that the system should be significantly deregulated to allow public officials greater discretion. I believe that the ability to exercise discretion would allow government to gain greater value from procurement.³⁴¹

In view of the discussion in the previous sections of this article, it is respectfully suggested that the discretion to exercise "common sense and good judgment" is a two-edged sword. Discretion is uniformly permitted and upheld in the competitive source selection phase of government contracts, but many more procurement problems in source selection have been caused by the discretion public officials have exercised than by the lack of discretion.

Consider, for example, recent initiatives relative to reliance on a contractor's performance on previous contracts. FASA³⁴² states, in § 1091, that an offeror's past performance should be considered in awarding a contract and requires OFPP to establish policies and procedures for this purpose. To help implement the statute, OFPP issued a *Best Practices Guide for Past Performance*.³⁴³ This guide states that one of the major factors to be evaluated is customer (i.e., government) satisfaction, which measures the "contractor's customer relations efforts" and "how well the contractor worked with the contracting officer."³⁴⁴ This "improvement" and procurement reform, if not more carefully defined and used, could have an undesired impact on competition in contracting. One solicitation involved in a decision last year described past performance as including the offeror's *reputation* for reasonable and cooperative behavior.³⁴⁵ In another decision, the references stated the protester was "difficult to work with," even though the protester contended it was being penalized principally for filing legitimate claims.³⁴⁶ In a third case, the protester was downgraded for past performance based in part on a reference who stated he would not choose to contract with the protester again because "he found the negotiation of modifications with the protester to be difficult."³⁴⁷ Do these cases suggest contractors will be downgraded for utilizing the remedies provided in standard government contract clauses? If so, there may be a short-term benefit to the Government, but the supply of potential vendors will eventually dwindle, to the detriment of competition.

The Competition Standard

A legislative proposal introduced in the House of Representatives on May 18, 1995, H.R. 1670,³⁴⁸ would change the CICA "full and open competition" standard to one of "maximum practicable competition." The measure would define "maximum practicable competition" to mean that "a maximum number of responsible or verified sources (consistent with the particular Government requirement) are permitted to submit sealed bids or competitive proposals on the procurement."³⁴⁹ The sponsors' analysis of the bill explained this change as follows:

Subsection (a) would amend 10 USC 2304(a) governing armed services acquisitions to establish a new standard of competition for the acquisition of goods and services - "maximum practicable" competition. This would replace the current requirement that all sources be given the "right" to be considered for government contracts whether or not the source has a realistic chance of supplying goods or services of the requisite quality at a reasonable price. The new standard would permit the government to focus on a meaningful competition among sources who can meet or exceed the government's requirements. In order to parallel the new competition standard the subsection would also amend 10 USC 2304(g)(3) which sets forth the standard for the use of competition in the simplified procedures for acquisitions under the simplified acquisition threshold to provide that agencies obtain competition to the "extent practicable" consistent with the particular requirement solicited.

There was no explanation in the analysis of what "a maximum number" of sources would be, what standards would be used to determine that number, and how the determination would be made. It is rather obvious that a "maximum" number translates to a "limited" number, but what will be the permissible limits?

According to a summary of the bill, the Government no longer can afford competition for the sake of competition.³⁹⁰ As discussed above, this never was a purpose of competition. Granting broad discretion to limit competitors no doubt will reduce the opportunity for the cost savings competition is presumed to obtain. Moreover, in view of the myriad permissible restrictions on competition currently available, one questions the desirability and even the necessity of additional legal authority to restrict competition.

A proposed amendment to the Fiscal Year 1996 National Defense Authorization Act offered during floor debate in the House of Representatives June 14, 1995, would have incorporated most of the provisions of H.R. 1670, including the change to "maximum practicable competition."³⁹¹ The DOD Inspector General opposed the proposed change in the competition standard.³⁹² However, an amendment to the proposed amendment superseded the proposed change and preserved the "full and open competition standard." The vote was 213 to 207, with 14 members not voting.³⁹³ The sponsors of HR 1670 stated that they will continue to pursue the bill as a freestanding measure,³⁹⁴ with a markup by the House Government Reform and Oversight Committee anticipated in late July. Thus, there could be another challenge to the full and open competition standard in the House. The Senate has yet to draft its version of acquisition reform legislation.

Another amendment to the defense bill adopted June 14 would require solicitations to include:

a description, in as much detail as is practicable, of the source selection plan of the agency, or a notice that such plan is available upon request.³⁹⁵

The sponsor of this amendment stated that if companies are better informed about how offers will be evaluated, they will be better able to give the Government "exactly what it needs and at the best price."³⁹⁶

The Competitive Range for Discussions

The "competitive range" refers to the proposals of offerors selected by the contracting officer for written or oral discussions.³⁹⁷ A proposal in the administration's pending acquisition reform legislation, the Federal Acquisition Improvement Act of 1995³⁹⁸ (H.R. 1388, S. 669), would authorize limitations to be placed on the number of offerors in the competitive range. Sections 1012 and 1062 provide:

If the contracting officer determines that the number of offerors that would otherwise be included in the competitive range under subparagraph (A)(i) exceeds the number at which an efficient competition can be conducted, the contracting officer may limit the number of offerors in the competitive range to the greatest number of competitors that will permit an efficient award; provided that when the competition is limited for this purpose, the number of offerors may not be limited to less than three."

The bill analysis explained this provision as follows:

This section would allow agencies to limit the number of offerors in the competitive range to no more than three when the contracting officer determines that such action would provide for efficiently making an award. After initially evaluating each offeror's proposal, agencies now, according to General Accounting Office (GAO) and General Services Administration Board of Contract Appeals (GSBCA) decisions, must look for the "natural break" in making a competitive range determination. If there is any question as to whether an offeror should be included in the competitive range, the offeror is kept in the competitive range. The result is that agencies generally

will not leave any offeror out of the competitive range unless that offeror clearly has no chance whatsoever of being awarded the contract.

This section would allow agencies to limit the number of offerors in the competitive range to three when the contracting officer determines that it is warranted by considerations of efficiency. In addition to enabling agencies to expedite the procurement process, limiting the size of the competitive range will allow offerors that do not have a real chance of receiving award to save time and money by being removed sooner rather than later.³⁹⁹

The immediate question raised by this provision is "What is efficient competition?" The next question is "Why is the provision necessary?"

The competitive range currently is defined to include "all proposals that have a reasonable chance of being selected for award."⁴⁰⁰ The Comptroller General has held consistently that the determination of whether a proposal is within the competitive range is primarily within the contracting officer's discretion and will not be disturbed unless it is unreasonable.⁴⁰¹ The GSBGA has similarly said that the contracting officer has "broad discretion" in determining the competitive range, and the decision will not be disturbed unless it is "clearly unreasonable."⁴⁰² Thus, both GAO and the GSBGA review only for "reasonableness." Contracting officers' determinations of which proposals have a reasonable chance of award may be based on their "relative" standing to other proposals.⁴⁰³ These determinations are really subjected to close scrutiny *only* where the result is a competitive range of *one*.⁴⁰⁴ Even determinations resulting in a competitive range of *one* will not be disturbed in the absence of a clear showing that they are unreasonable.⁴⁰⁵

With the contracting officer's broad discretion recognized by both the Comptroller General and the GSBGA, and the test applied being only "reasonableness," why would a contracting officer *want* to exclude offerors that have a *reasonable chance* for award? When competitive "ranges" of one are routinely approved (albeit after "close scrutiny"), why is statutory authority to limit the number to three deemed necessary? It is difficult to see how "efficiency" could outweigh the benefits of competition.

An alternative approach is contained in an amendment to the defense bill adopted by the House June 14, which provides:

With respect to competitive proposals, the head of the agency may make a preliminary assessment of a proposal received, rather than a complete evaluation of the proposal and may eliminate the proposal from further consideration if the head of the agency determines the proposal has no chance for contract award.⁴⁰⁶

This provision would merely reflect an early exclusion from the competitive range and, essentially, would only confirm authority already exercised by contracting officers.⁴⁰⁷

Conclusion

Most of our problems of "efficiency" in acquisitions are caused not by competition but by the lack of competition or the poor quality of competition. When the goals or "requirements" are ambiguous, when there are no "rules" or the rules are not disclosed, and when selections are made based on vague, indefinite, and subjective standards, protests can be expected, and potential competitors are lost. Indeed, the public and taxpayers are fortunate in that the bid protest system provides a vehicle to expose the problems and serve as a protection against favoritism, excessive requirements, and other mischief. There is no more efficient way to "police" the procurement system than to have it done by the competitors themselves. They know the requirements, they know the government technical and contracts representatives, and they know one another. An army of auditors or inspectors general could not possibly perform "compliance reviews" as effectively as the bid protest system operates.

If Congress wants to reduce acquisition costs, attention should be directed toward *improving*, not reducing, competition. Training should be provided for those who plan for requirements and define the Government's needs in specifications and statements of work (which serve as the baseline for evaluating proposals). Standard evaluation factors, as objective as possible, should be established with required criteria for their application. Training should be provided for government technical personnel who evaluate proposals. Agencies should be required to recognize, or at least accept, that disclosing selection plans (and evaluation factors) and conducting source selections in the "purifying" sunlight will result in lower costs and fewer delays. Standards should be established for procurement officials, and those who are unwilling to accept the obligations of competition in source selection should be replaced. The monetary value of competition should be apparent from the Government's own studies cited earlier in this article.⁴⁰⁸ If there is any remaining doubt regarding the benefits of competition, Congress should require all agencies to report each year all "competitive" awards that were not made to the offeror in the competitive range with the lowest price, and the amount of the difference. This should not be difficult because, if a proposal did not have a reasonable chance of being selected, it should have been excluded from the competitive range determination.

There are proposals today to reduce the "rules" in competition under the guise of efficiency and of affording more flexibility and discretion to contracting officials. It is interesting that the lack of "rules" has led to litigation in recent years in recreational sports, such as softball, touch football, and "pickup" basketball. In one softball game, a runner slid into home plate and injured the catcher.

From that single play grew a six-year court battle that raised some unusual questions: Is sliding fair play? Is there a difference between "plowing" and "barreling" into another player? And what exactly did Ty Cobb mean when he said "the baseline belongs to the base runner?"⁴⁰⁹

Competition for government contracts is not a sport—it is a costly and serious business—but the problems of indefinite rules are applicable to both types of competition. *Reducing the "rules" may well reduce competition itself.* Each decision affecting the rules of competition affects the quality of competition. The lower the quality of competition, the more incidents of favoritism, collusion, fraud, and unnecessary expenditures can be expected. Before proposed "reforms" and "improvements" are embraced, careful attention should be paid to the fundamental rules of competition under which our procurement system has operated for nearly two centuries. We should look *backward* to the reasons for our traditional rules and *forward* to the impact and possible consequences of change.

There are even *contractors* who support reducing the rules of competition. They often do so, however, because they do not like, or will not accept, the "baggage" of government contract terms and conditions (which are not related to "competition"). These contractors should recall the colloquy between Sir Thomas More and Master Roper in the play *A Man For All Seasons*,⁴¹⁰ in which Roper is shocked that More would give the Devil the benefit of the law (which More said he would do for his own safety's sake). That colloquy is paraphrased (very loosely) below, with More now in the role of a government contractor.

Roper:

Would you want even your competitors to have the benefit of the rules of competition?

More:

Yes! What would *you* do? Cut a great road through the rules to obtain your government contracts?

Roper:

I'd cut down every procurement rule in the country to get my contracts.

More:

Oh? And when the last rule is gone and your competitors become the Government's favored suppliers, how could you get contracts then with all the rules eliminated?

Our procurement system is planted thick with rules. If you cut out the rules, do you really think you would have a chance of getting government contracts if you had no protection from arbitrary government action, undisclosed requirements, restrictive specifications, favoritism, political influences, inside information, conflicts of interest, and even fraud?

Yes, I want to keep the competition rules for my own business' sake.

Endnotes

- ¹ *Perkins v. Lukens Steel Co.*, 310 U.S. 113, 127 (1940).
- ² *United States v. New York & Porto Rico Steamship Co.*, 239 U.S. 88, 93 (1915).
- ³ *Ellis v. United States*, 206 U.S. 246, 256 (1907).
- ⁴ H.R. Rep. No. 1157, 98th Cong., 2d Sess. 18 (1984), quoted in *Project Software & Development, Inc.*, GSBGA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,413.
- ⁵ Senate Committee on Government Affairs, S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code Cong. & Admin. News 2174-5. This view was also recently expressed in a letter dated June 13, 1995, from the Department of Defense Inspector General to Congressman William F. Clinger, Jr., 141 Cong. Rec. H5926 (daily ed. June 14, 1995).
- ⁶ *United States v. Brookridge Farm, Inc.*, 111 F.2d 461, 463 (10th Cir. 1940).
- ⁷ *J. L. Manta, Inc. v. Braun*, 376 N.W.2d 466 (Minn. Ct. App. 1985); accord *Sterrett v. Bell*, 240 S.W.2d 516, 520 (Tex. Civ. App.—Dallas 1951).
- ⁸ *L. & R. Rail Service*, B-256341, June 10, 1994, 94-1 CPD ¶ 356 at 3.
- ⁹ Title VII of the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494, 1175 (1984).
- ¹⁰ *Allfast Fastening Systems, Inc.*, B-251315, 93-1 CPD ¶ 266 (n.3 at 6).
- ¹¹ Statement of Thomas D. Morris, Assistant Secretary of Defense (Installations and Logistics), Sept. 2, 1962, to the Select Committee on Small Business, *The Role of Small Business in Government Procurement—1962-1963*, Hearings Before the Select Committee on Small Business 5, 87th Cong., 2d Sess. (Sept. 12, 1962).
- ¹² Background Material on Economic Aspects of Military Procurement and Supply, Joint Economic Committee of the Congress of the United States at 69, 88th Cong., 1st Sess. (1963).
- ¹³ *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503 at 4.
- ¹⁴ S. Rep. No. 98-50, note 5, *supra* at 2176.
- ¹⁵ *Id.*
- ¹⁶ 1 Report of the Commission on Government Procurement 163-64 (Dec. 31, 1972).
- ¹⁷ 2 Stat. 536 (1809).
- ¹⁸ Sec. 10 of Act of March 2, 1861, 12 Stat. 214, 220.
- ¹⁹ Revised Statutes of the United States § 3709 (1873-1874).
- ²⁰ 18 Comp. Gen. 285, 293 (1938); 10 Comp. Gen. 294, 301 (1931).
- ²¹ 20 Comp. Gen. 903, 907 (1941); See 17 Comp. Gen. 789 (1938) ("free and open").
- ²² 32 Comp. Gen. 384 (1953).
- ²³ Quoted in Nash & Cibinic, *Federal Procurement Law* 222, 230 (George Washington Univ., 2d ed. 1969).
- ²⁴ Title II of the First War Power Act, 55 Stat. 839 (1941).
- ²⁵ Letter dated January 13, 1947, from Acting Secretary of the Navy to the Speaker of the House of Representatives, included in S. Rep. No. 571 (July 16, 1947), 2 U.S. Code Cong. Serv. 1048, 1075, 80th Cong., 2d Sess. (1948).
- ²⁶ 62 Stat. 21 (Feb. 19, 1948).
- ²⁷ *Id.*
- ²⁸ 70A Stat. 130 (1956).
- ²⁹ Letter dated Jan. 17, 1947, from Secretary of War to the Speaker of the House of Representatives included in S. Rep. No. 571, note 25, *supra*.
- ³⁰ S. Rep. No. 571 at 1, note 25, *supra*.
- ³¹ 63 Stat. 377, 395 (June 30, 1949).
- ³² S. Rep. No. 98-50 at 5, note 5, *supra*.
- ³³ *Id.* at 9.
- ³⁴ *Id.* at 17.
- ³⁵ CICA § 2711(a)(1), note 9, *supra*; 41 U.S.C. § 253.
- ³⁶ CICA § 2723(b), note 9, *supra*; 10 U.S.C. § 2305.
- ³⁷ 10 U.S.C. § 2305(a)(1)(B)(ii); 41 U.S.C. § 253a(a)(2)(B).
- ³⁸ Conference Report on the Deficit Reduction Act of 1984, H.R. Rep. No. 98-861, 98th Cong., 2d Sess. at 1429 (1984), 1984 U.S. Code Cong. & Admin. News 2117.
- ³⁹ *Id.* at 1422.
- ⁴⁰ *Id.* See *James LaMantia*, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574 at 23.
- ⁴¹ Section 2731 of CICA amended the Office of Federal Procurement Policy Act, 41 U.S.C. § 403, to add these definitions.
- ⁴² 41 U.S.C. § 418.
- ⁴³ *Businessland, Inc.*, GSBGA No. 8586-P-R, 86-3 BCA ¶ 19,288 at 97,513.
- ⁴⁴ 10 U.S.C. § 2304(e)(1); 41 U.S.C. § 253(c)(1); FAR § 6.302-1.
- ⁴⁵ *Id.* See *Ames-Avon Indus.*, B-227839.3, July 20, 1987, 87-2 CPD ¶ 71.

- " FAR § 6.302-1(a)(2).
 " 10 U.S.C. § 2304(c)(2); 41 U.S.C. § 253(c)(2); FAR § 6.302-2.
 " 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).
 " *Honeycomb Co.*, B-227070, Aug. 31, 1987, 87-2 CPD ¶ 209.
 " *IMR Systems Corp.*, B-222465, July 7, 1986, 86-2 CPD ¶ 36.
 " 10 U.S.C. § 2304(c)(3); 41 U.S.C. § 253(c)(3); FAR § 6.302-3. See *Propper International, Inc.*, B-229888, Mar. 22, 1988, 88-1 CPD ¶ 296.
 " 10 U.S.C. § 2304(c)(4); 41 U.S.C. § 253(c)(4); FAR § 6.302-4.
 " *Kahn Indus., Inc.*, B-225491, Mar. 26, 1987, 87-1 CPD ¶ 343. See *Group Technologies Corp.*, B-250699, Feb. 17, 1993, 93-1 CPD ¶ 150.
 " 10 U.S.C. § 2304(c)(5); 41 U.S.C. § 253(c)(5); FAR § 6.302-5.
 " FAR § 6.302-5.
 " 10 U.S.C. § 2304(c)(6); 41 U.S.C. § 253(c)(6); FAR § 6.302-6.
 " *Federal Labs Systems*, B-224258, Feb. 4, 1987, 87-1 CPD ¶ 111.
 " 10 U.S.C. § 2304(c)(7); 41 U.S.C. § 253(c)(7); FAR § 6.302-7.
 " *Acumenics Research & Technology, Inc.*, B-224702, Aug. 5, 1987, 87-2 CPD ¶ 128.
 " 10 U.S.C. § 2304(g); 41 U.S.C. § 253(g). See *Omni Elevator Co.*, B-246393, Mar. 6, 1992, 92-1 CPD ¶ 264; see also *Helitune, Inc.*, B-243617.2, Mar. 16, 1992, 92-1 CPD ¶ 285.
 " *Tecom Industries, Inc.*, B-236371, Dec. 5, 1989, 89-2 CPD ¶ 516.
 " S. Rep. No. 571, 2 U.S. Code Cong. Serv. 1048, 1064, 80th Cong., 2d Sess. (1947); H.R. Rep. No. 670, 2 U.S. Code Cong. Serv. 1475, 1498, 81st Cong., 1st Sess. (1949).
 " FAR Part 14.
 " FAR Part 15.
 " S. Rep. No. 98-50, 98th Cong., 2d Sess. (1984), 1984 U.S. Code & Admin. News 2174, 2191.
 " Note 40, *supra*, and accompanying text.
 " Note 38, *supra*, and accompanying text.
 " Source selection procedures are designed to "maximize competition." FAR § 15.603(a).
 " *CRC Systems, Inc.*, GSBGA No. 9385-P, 88-2 BCA ¶ 20,665 at 104,436; *NUS Corp.*, B-221863, June 20, 1986, 86-1 CPD ¶ 574; *Descomp, Inc.*, B-220085.2, Feb. 19, 1986, 86-1 CPD ¶ 172.
 " *Military Waste Management, Inc.*, B-240769.3, Feb. 7, 1991, 91-1 CPD ¶ 135.
 " *DSI, Inc.*, GSBGA No. 8568-P, 87-1 BCA ¶ 19,407.
 " Note 37, *supra*.
 " *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266 at 5; *Pacific Scientific Co.*, B-231175, Aug. 30, 1988, 88-2 CPD ¶ 193.
 " See, e.g., *James LaMantia*, B-245287, Dec. 23, 1991, 91-2 CPD ¶ 574; *Kahr Bearing*, B-228550.2, Feb. 25, 1988, 88-1 CPD ¶ 192; *Packaging Corp.*, B-225823, July 20, 1987, 87-2 CPD ¶ 65.
 " *Trimble Navigation, Ltd.*, B-247913, July 13, 1992, 92-2 CPD ¶ 17.
 " 41 U.S.C. § 403(7)(B); *Transtor Aerospace, Inc.*, B-239467, Aug. 16, 1990, 90-2 CPD ¶ 134.
 " *Old Dominion Security*, ASBCA No. 40062, 91-3 BCA ¶ 24,173 at 120,918.
 " *North American Reporting, Inc.*, B-198448, Nov. 18, 1980, 80-2 CPD ¶ 364.
 " 39 Comp. Gen. 570 (1960). *Accord* 51 Comp. Gen. 518 (1972) (solicitation permitting deviations from specifications do not "generally" permit free and equal competitive bidding).
 " 10 U.S.C. § 2305(a)(1)(A)(i) and (B)(i); 41 U.S.C. § 253a(a)(1)(A) and (2)(B).
 " *Adventure Tech, Inc.*, B-253520, Sept. 29, 1993, 93-2 CPD ¶ 202.
 " *Bishop Contractors, Inc.*, B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555; n.2 at 3.
 " *CPT Corp.*, GSBGA No. 8134-P-R, Jan. 28, 1986, 86-1 BCA ¶ 18,727 at 94,239.
 " *Container Products Corp.*, B-255883, April 13, 1994, 94-1 CPD ¶ 255.
 " 10 U.S.C. § 2305(b)(1); 41 U.S.C. § 253b(a).
 " *Aydin Corp.*, B-227817, Sept. 28, 1987, 87-2 CPD ¶ 306.
 " *Resource Consultants, Inc.*, GSBGA No. 8342-P, April 17, 1986, 86-2 BCA ¶ 18,942 at 95,677.
 " 10 U.S.C. § 2305(a)(2); 41 U.S.C. § 253a(b).
 " Pub. L. No. 103-355 (Oct. 13, 1994), 108 Stat. 3243, §§ 1011 and 1061.
 " 10 U.S.C. § 2305(b); 41 U.S.C. § 253b(c) and (d).
 " *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.
 " *Professional Data Systems*, GSBGA No. 8475-P, 86-3 BCA ¶ 19,083 at 96,422.
 " *Abel Converting Co.*, B-229065, Jan. 15, 1988, 88-1 CPD ¶ 40.
 " *Uniform Rental Services*, B-228293, Dec. 9, 1987, 87-2 CPD ¶ 571. *Accord* *Abel Converting Co.*, note 93, *supra*.
 " *W. H. Smith Hardware Co.—Recon.*, B-222045.2, July 1, 1986, 86-2 CPD ¶ 1.
 " *Cycad Corp.*, B-255870, April 12, 1994, 94-1 CPD ¶ 253; *Engine & Generator Rebuilders*, B-220157, Jan. 13, 1986, 86-1 CPD ¶ 27.
 " *Julie Research Laboratories, Inc.*, GSBGA No. 9474-P, 88-3 BCA ¶ 20,966 at 105,954-55. The Comptroller General also expressed this view, saying: "it would seem that necessarily all specifications are restrictive in the sense that the requirements they establish, whether reasonable or not, preclude the purchase of nonconforming items" Unpub. Comp. Gen. B-168278 (Mar. 30, 1970).
 " 1 Comp. Dec. 363, 364 (April 10, 1895).
 " *Harbor Branch Oceanographic Institution, Inc.*, B-243417, July 17, 1991, 91-2 CPD ¶ 67.

- ¹⁰⁰ *ViON Corp.*, B-256363, June 15, 1994, 94-1 CPD ¶ 373. In this case, the Comptroller General held that the language of the specification did not express the agency's minimum needs and was "overly restrictive."
- ¹⁰¹ *Science Pump Corp.*, B-255803, April 4, 1994, 94-1 CPD ¶ 227.
- ¹⁰² *Integrated Systems Group, Inc. v. Department of the Army*, GSBAC No. 12417P, 94-1 BCA ¶ 26,273 at 130,716.
- ¹⁰³ *Argus Research Corp.*, B-249055, Oct. 20, 1992, 92-2 CPD ¶ 260.
- ¹⁰⁴ *Id.*
- ¹⁰⁵ *Keeson, Inc.*, B-245625, Jan. 24, 1992, 92-1 CPD ¶ 108.
- ¹⁰⁶ FAR § 9.201. The use of the qualified products list is inherently restrictive of competition and may be used only where the application is not unnecessarily restrictive. *McGean-Rohco, Inc.*, B-218616, Aug. 7, 1985, 85-2 CPD ¶ 140.
- ¹⁰⁷ *Stevens Technical Services, Inc.*, B-250515.2, May 17, 1993, 93-1 CPD ¶ 385, n.8.
- ¹⁰⁸ *Tura Machine Co.*, B-241426, Feb. 4, 1991, 91-1 CPD ¶ 114.
- ¹⁰⁹ *Interstate Diesel Services, Inc.*, B-230107, May 20, 1988, 88-1 CPD ¶ 480.
- ¹¹⁰ *Goodyear Tire & Rubber Co.*, B-247363.6, Oct. 23, 1992, 92-2 CPD ¶ 315.
- ¹¹¹ 10 U.S.C. § 2319; 41 U.S.C. § 253c.
- ¹¹² *Advanced Seal Technology, Inc.*, B-249855.2, Feb. 15, 1993, 93-1 CPD ¶ 137; *BWC Technologies, Inc.*, B-242734, May 16, 1991, 91-1 CPD ¶ 474.
- ¹¹³ *Alpha Technical Services, Inc.*, B-251147, Mar. 15, 1993, 93-1 CPD ¶ 234.
- ¹¹⁴ *Electro-Methods, Inc.*, B-255023.3, Mar. 4, 1994, 94-1 CPD ¶ 173.
- ¹¹⁵ *Advanced Seal Technology, Inc.*, note 112, *supra*.
- ¹¹⁶ *Lambda Signatics, Inc.*, B-257756, Nov. 7, 1994, 94-2 CPD ¶ 175; *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208.
- ¹¹⁷ *Iowa-Illinois Cleaning Co.*, B-254805, Jan. 18, 1994, 94-1 CPD ¶ 22.
- ¹¹⁸ *PBSI Corp.*, B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333.
- ¹¹⁹ *Cobra Technologies, Inc.*, B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310; *Roger L. Herbst*, B-244773, Nov. 19, 1991, 91-2 CPD ¶ 476.
- ¹²⁰ *Remtech, Inc.*, B-240402.5, Jan. 4, 1991, 91-1 CPD ¶ 35; *J & J Maintenance, Inc.*, B-239035, July 16, 1990, 90-2 CPD ¶ 35. See *Taina U.S. Inc.*, B-240892, Dec. 21, 1990, 90-2 CPD ¶ 517 (continuous operation merely "necessary").
- ¹²¹ *Aspen Cleaning Corp.*, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289.
- ¹²² *Maintrac Corp.*, B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257.
- ¹²³ *Triple P Services, Inc.*, B-249443, Oct. 30, 1992, 92-2 CPD ¶ 313.
- ¹²⁴ *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
- ¹²⁵ *Resource Consultants, Inc.*, B-255053, Feb. 1, 1994, 94-1 CPD ¶ 59.
- ¹²⁶ *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
- ¹²⁷ *Space Vector Corp.*, B-253295.2, Nov. 8, 1993, 93-2 CPD ¶ 273.
- ¹²⁸ *Titan Dynamics Simulations, Inc.*, B-257559, Oct. 13, 1994, 94-2 CPD ¶ 139; *Institutional Communications Co.*, B-233058.5, Mar. 18, 1991, 91-1 CPD ¶ 292.
- ¹²⁹ *Electro-Methods, Inc.*, B-239141.2, Nov. 5, 1990, 90-2 CPD ¶ 363.
- ¹³⁰ *Batch-Air, Inc.*, B-204574, Dec. 29, 1981, 81-2 CPD ¶ 509.
- ¹³¹ *TLC Services, Inc.*, B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.
- ¹³² *Astro-Volcure, Inc.*, B-257485, Oct. 6, 1994, 94-2 CPD ¶ 129.
- ¹³³ *Precision Photo Laboratories Inc.*, B-251719, April 29, 1993, 93-1 CPD ¶ 359.
- ¹³⁴ *The Sequoia Group, Inc.*, B-252016, May 24, 1993, 93-1 CPD ¶ 405.
- ¹³⁵ *National Customer Engineering*, B-251135, Mar. 11, 1993, 93-1 CPD ¶ 1225.
- ¹³⁶ *Eastern Trans-Waste Corp.*, B-214805, July 30, 1984, 84-2 CPD ¶ 126.
- ¹³⁷ *Southwestern Bell Telephone Co.*, B-231822, Sept. 29, 1988, 88-2 CPD ¶ 300.
- ¹³⁸ *ucson Mobilephone, Inc.*, B-256802, July 27, 1994, 94-2 CPD ¶ 45.
- ¹³⁹ *Chicago City Wide College*, B-218433, Aug. 6, 1985, 85-2 CPD ¶ 133; *Chicago City-Wide College*, B-212274, Jan. 4, 1984, 84-1 CPD ¶ 51.
- ¹⁴⁰ *Allfast Fastening Systems, Inc.*, B-251315, Mar. 25, 1993, 93-1 CPD ¶ 266.
- ¹⁴¹ *D. Moody & Co.*, B-185647, Sept. 1, 1976, 76-2 CPD ¶ 211.
- ¹⁴² *Vac-Hyd Corp.*, B-216840, July 1, 1985, 85-2 CPD ¶ 2.
- ¹⁴³ *King-Fisher Co.*, B-256849, July 28, 1994, 94-2 CPD ¶ 62; *Tek Contracting, Inc.*, B-245590, Jan. 17, 1992, 92-1 CPD ¶ 90.
- ¹⁴⁴ *Talon Manufacturing Co.*, B-257536, Oct. 14, 1994, 94-2 CPD ¶ 140.
- ¹⁴⁵ *G. H. Harlow Co.*, B-254839, Jan. 21, 1994, 94-1 CPD ¶ 29.
- ¹⁴⁶ *I.T.S. Corp.*, B-243223, July 15, 1991, 91-2 CPD ¶ 55.
- ¹⁴⁷ *Marine Transport Lines, Inc.*, B-224480.5, July 27, 1987, 87-2 CPD ¶ 91.
- ¹⁴⁸ *Software City*, B-217542, April 26, 1985, 85-1 CPD ¶ 475.
- ¹⁴⁹ *Marlen C. Robb & Son, Boatyard & Marina, Inc.*, B-256516, June 28, 1994, 94-1 CPD ¶ 392.
- ¹⁵⁰ *Microwave Radio Corp.*, B-227962, Sept. 21, 1987, 87-2 CPD ¶ 288.
- ¹⁵¹ *GE American Communications, Inc.*, B-248575, Sept. 4, 1992, 92-2 CPD ¶ 155; *Yale Materials Handling Corp.*, B-230209, Mar. 22, 1988, 88-1 CPD ¶ 302.
- ¹⁵² *AAA Engineering & Drafting, Inc.*, B-237383, Jan. 22, 1990, 90-1 CPD ¶ 187; *Shoney's Inn*, B-231113, June 24, 1988, 88-1 CPD ¶ 609.
- ¹⁵³ *Westcott General*, B-241570, Feb. 5, 1991, 91-1 CPD ¶ 120.
- ¹⁵⁴ *NFI Management Co.*, B-240788, Dec. 12, 1990, 90-2 CPD ¶ 484.
- ¹⁵⁵ *Canal Claiborne Ltd.*, B-244211, Sept. 23, 1991, 91-2 CPD ¶ 266.

- ¹⁵⁴ *Pamela A. Lambert*, B-227849, Sept. 28, 1987, 87-2 CPD ¶ 308.
- ¹⁵⁵ *CardioMeirix*, B-250247, Dec. 14, 1992, 92-2 CPD ¶ 414.
- ¹⁵⁶ *Leo Kanner Assoc.*, B-194327, Nov. 5, 1979, 79-2 CPD ¶ 318. See *Bartow Group*, B-217155, Mar. 18, 1985, 85-1 CPD ¶ 320.
- ¹⁵⁷ *Anglo American Auto Auctions, Inc.*, B-242538, April 29, 1991, 91-1 CPD ¶ 416.
- ¹⁵⁸ *Days Inn Marina*, B-254913, Jan. 18, 1994, 94-1 CPD ¶ 23.
- ¹⁵⁹ *Ramada Inn of Des Moines*, B-233504, Feb. 6, 1989, 89-1 CPD ¶ 123.
- ¹⁶⁰ *Blaine Hudson Printing*, B-247004, April 22, 1992, 92-1 CPD ¶ 380.
- ¹⁶¹ *Pacific Bell Telephone Co.*, B-231403, July 27, 1988, 88-2 CPD ¶ 93.
- ¹⁶² *Pacific Architects & Engineers Inc.*, B-240310, Nov. 2, 1990, 90-2 CPD ¶ 359.
- ¹⁶³ *Computer Maintenance Operations Services*, B-255530, Feb. 23, 1994, 94-1 CPD ¶ 170; *G. S. Link & Assoc.*, B-229604, Jan. 25, 1988, 88-1 CPD ¶ 70.
- ¹⁶⁴ *Phillips Cartner & Co.*, B-224370.2, Oct. 2, 1986, 86-2 CPD ¶ 382.
- ¹⁶⁵ *Chi Corp.*, B-224019, Dec. 3, 1986, 86-2 CPD ¶ 634.
- ¹⁶⁶ *Id.*
- ¹⁶⁷ *Libby Corp.*, B-220392, Mar. 7, 1986, 86-1 CPD ¶ 227.
- ¹⁶⁸ 10 U.S.C. § 2304(e); 41 U.S.C. § 253(e).
- ¹⁶⁹ *Immunalysis/Diagnostix of California Corp.*, B-254386, Dec. 8, 1993, 93-2 CPD ¶ 309.
- ¹⁷⁰ *Sargent & Greenleaf, Inc.*, B-255604.3, Mar. 22, 1994, 94-1 CPD ¶ 208; *Colbar, Inc.*, B-230754, June 13, 1988, 88-1 CPD ¶ 562.
- ¹⁷¹ *DOD Contracts, Inc.*, B-250603.2, Mar. 3, 1993, 93-1 CPD ¶ 195.
- ¹⁷² *Equa Industries, Inc.*, B-257197, Sept. 6, 1994, 94-2 CPD ¶ 96.
- ¹⁷³ *AUL Instruments, Inc.*, B-186319, Sept. 1, 1976, 76-2 CPD ¶ 212.
- ¹⁷⁴ *Camar Corp.*, B-253016, Aug. 11, 1993, 93-2 CPD ¶ 94.
- ¹⁷⁵ *Bironas, Inc.*, B-249428, Nov. 23, 1992, 92-2 CPD ¶ 365; *Constantine N. Polites & Co.*, B-239389, Aug. 16, 1990, 90-2 CPD ¶ 132; *M. C. & D. Capital Corp.*, B-225830, July 10, 1987, 87-2 CPD ¶ 32.
- ¹⁷⁶ *Fry Communications, Inc.*, B-220451, Mar. 18, 1986, 86-1 CPD ¶ 265.
- ¹⁷⁷ *Pem All Fire Extinguisher Corp.*, B-231478, July 27, 1988, 88-2 CPD ¶ 95.
- ¹⁷⁸ *Coastal Computer Consultants Corp.*, B-253359, Sept. 7, 1993, 93-2 CPD ¶ 155.
- ¹⁷⁹ *DGS Contract Services, Inc.*, B-249845.2, Dec. 23, 1992, 92-2 CPD ¶ 435.
- ¹⁸⁰ *Coastal Computer Consultants Corp. v. Department of Commerce, GSBICA No. 12869-P, 94-3 BCA ¶ 27,151; InSyst Corp., GSBICA No. 9946-P, 89-2 BCA ¶ 21,782.*
- ¹⁸¹ *Lionhart Group, Ltd.*, B-257715, Oct. 31, 1994, 94-2 CPD ¶ 170.
- ¹⁸² *Procurement: Better Compliance With the Competition in Contracting Act Is Needed*, GAO/NSIAD-87-145 (Aug. 26, 1987).
- ¹⁸³ *Procurement: Efforts Still Needed to Comply With the Competition in Contracting Act*, GAO/NSIAD-90-104 (May 1990).
- ¹⁸⁴ *American Sterilizer Co.*, B-223493, Oct. 31, 1986, 86-2 CPD ¶ 503.
- ¹⁸⁵ *Defense Inventory: Extent of Diminishing Manufacturing Sources Problems Still Unknown*, GAO/NSIAD-95-85 at 1 (April 1995).
- ¹⁸⁶ *Id.* at 1-2.
- ¹⁸⁷ *East West Research, Inc.*, B-239919, Aug. 28, 1990, 90-2 CPD ¶ 172; *Nasuf Construction Corp.—Recon.*, B-219733.2, Mar. 18, 1986, 86-1 CPD ¶ 263.
- ¹⁸⁸ 10 U.S.C. § 2305(a)(1)(A)(iii); 41 U.S.C. § 253a(a)(1)(C); FAR § 10.004(a)(1).
- ¹⁸⁹ *Maremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.
- ¹⁹⁰ Note 79, *supra*, and accompanying text.
- ¹⁹¹ *Triple P Services, Inc.*, B-220437.3, April 3, 1986, 86-1 CPD ¶ 318.
- ¹⁹² *Arthur Young & Co.*, B-216643, May 24, 1985, 85-1 CPD ¶ 598.
- ¹⁹³ *Federal Computer Corp.*, B-223932, Dec. 10, 1986, 86-2 CPD ¶ 665.
- ¹⁹⁴ *Communications Corps, Inc.*, B-179994, April 3, 1974, 74-1 CPD ¶ 168.
- ¹⁹⁵ *Consolidated Devices, Inc.—Recon.*, B-225602.2, April 24, 1987, 87-1 CPD ¶ 437.
- ¹⁹⁶ *See Interface Flooring Systems, Inc.*, B-225439, Mar. 4, 1987, 87-1 CPD ¶ 247.
- ¹⁹⁷ *Harris Corp.*, B-217174, April 22, 1985, 85-1 CPD ¶ 455.
- ¹⁹⁸ *Express Signs International*, B-227144, Sept. 14, 1987, 87-2 CPD ¶ 243; *Korean Maintenance Co.*, B-223780, Oct. 2, 1986, 86-2 CPD ¶ 379.
- ¹⁹⁹ *ACRAIN, Inc.*, B-225654, May 14, 1987, 87-1 CPD ¶ 509 at 7-8.
- ²⁰⁰ *Parker's Mechanical Contractors, Inc.*, ASBCA No. 32842, 88-1 BCA ¶ 20,472. *Accord Electrical Contracting Corp. of Guam, Inc.*, ASBCA No. 33136, 90-3 BCA ¶ 22,974.
- ²⁰¹ *Loral Fairchild Corp.*, B-242957, June 24, 1991, 91-1 CPD ¶ 594.
- ²⁰² Note 185, *supra*, at 7.
- ²⁰³ *Community Heating & Plumbing Co. v. Kelso*, 987 F.2d 1575 (Fed. Cir. 1993); *Technocratia*, ASBCA No. 44134, 94-2 BCA ¶ 26,606.
- ²⁰⁴ *Fort Vancouver Plywood Co. v. United States*, 860 F.2d 409, 414 (Fed. Cir. 1988).
- ²⁰⁵ *Henry Shirek*, ASBCA No. 28414, 86-1 BCA ¶ 18,560.
- ²⁰⁶ *Premiere Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *U.S. Defense Systems, Inc.*, B-251544, Mar. 30, 1993, 93-1 CPD ¶ 279.
- ²⁰⁷ See notes 88 and 89, *supra*, and accompanying text.
- ²⁰⁸ *C3, Inc.*, B-241983.2, Mar. 13, 1991, 91-1 CPD ¶ 279.
- ²⁰⁹ *G. Marine Diesel*, B-232619, Jan. 27, 1989, 89-1 CPD ¶ 90.

- ¹¹¹ *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *A. J. Fowler Corp.*, B-233326, Feb. 16, 1989, 89-1 CPD ¶ 166.
- ¹¹² FAR § 15.605(c); *North-East Imaging, Inc.*, B-256281, June 1, 1994, 94-1 CPD ¶ 332; *Lewis & Smith Construction Co.*, B-253382, Sept. 8, 1993, 93-2 CPD ¶ 150; *T. H. Taylor, Inc.*, B-227143, Sept. 15, 1987, 87-2 CPD ¶ 252.
- ¹¹³ *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244; *Accord Essex Electro Engineers, Inc.*, B-252288.2, July 23, 1993, 93-2 CPD ¶ 47.
- ¹¹⁴ *J. A. Jones Management Services, Inc.*, B-254941.2, Mar. 16, 1994, 94-1 CPD ¶ 244.
- ¹¹⁵ *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223.
- ¹¹⁶ *Loral Aerospace Corp.*, B-258817, Feb. 21, 1995, 95-1 CPD ¶ 97.
- ¹¹⁷ *Chadwick-Helmuth Co.*, B-238645.2, Nov. 19, 1990, 90-2 CPD ¶ 400.
- ¹¹⁸ *Princeton Gamma-Tech, Inc.*, B-228052.2, Feb. 17, 1988, 88-1 CPD ¶ 175. The Request for Proposals said proposals must reflect if the product "meets or exceeds" the specifications, but it did not indicate points would be scored for exceeding the performance requirements.
- ¹¹⁹ *Astrophysics Research Corp.*, B-228718.3, Feb. 18, 1988, 88-1 CPD ¶ 167 at 4.
- ¹²⁰ See *Able-One Refrigeration, Inc.*, B-244695, Oct. 28, 1991, 91-2 CPD ¶ 384; *Power Conversion, Inc.*, B-239301, Aug. 20, 1990, 90-2 CPD ¶ 145.
- ¹²¹ *American Development Corp.*, B-251876.4, July 12, 1993, 93-2 CPD ¶ 49.
- ¹²² CICA § 2711(a)(1), 2723, note 9, *supra*.
- ¹²³ 50 Fed. Reg. 1726, 1740 (Jan. 11, 1985).
- ¹²⁴ *Hydrascience, Inc.*, B-227989, Nov. 23, 1987, 87-2 CPD ¶ 501; *Engineering Consultants & Publications—Recon.*, B-225982.5, June 16, 1987, 87-1 CPD ¶ 598.
- ¹²⁵ *Coopers & Lybrand*, B-224213, Jan. 30, 1987, 87-1 CPD ¶ 100.
- ¹²⁶ *Hoffman Management, Inc.*, B-238752, July 6, 1990, 90-2 CPD ¶ 15.
- ¹²⁷ *Ward/Hall Associates AIA*, B-226714, June 17, 1987, 87-1 CPD ¶ 605.
- ¹²⁸ Section 802(a), National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 105 Stat. 1588 (Nov. 5, 1990), amended by 10 U.S.C. § 2305(a)(2)(A).
- ¹²⁹ H.R. Rep. No. 101-665, 101st Cong., 2d Sess., 1990 U.S. Code Cong. & Admin. News 2931, 3029.
- ¹³⁰ *Macro Service Systems, Inc.*, B-246103, Feb. 19, 1992, 92-1 CPD ¶ 200.
- ¹³¹ *DeLima Assoc.*, B-258278.2, Dec. 20, 1994, 94-2 CPD ¶ 253.
- ¹³² *Avogadro Energy Systems*, B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229.
- ¹³³ *Teledyne Brown Engineering*, B-258078, Dec. 6, 1994, 94-2 CPD ¶ 223; *Specialized Technical Services, Inc.*, B-247489.2, June 11, 1992, 92-1 CPD ¶ 510.
- ¹³⁴ *Information Systems Networks, Inc.*, B-254384.3, Jan. 21, 1994, 94-1 CPD ¶ 27.
- ¹³⁵ *Information Spectrum, Inc.*, B-256609.3, Sept. 1, 1994, 94-2 CPD ¶ 251.
- ¹³⁶ *System Resources, Inc. v. Department of the Navy*, GSBGA No. 12536-P, 94-1 BCA ¶ 26,388 at 131,282.
- ¹³⁷ *Richard S. Cohen*, B-256017.4, June 27, 1994, 94-1 CPD ¶ 382 at 6.
- ¹³⁸ *Sunbelt Properties, Inc.*, B-249469, Nov. 17, 1992, 92-2 CPD ¶ 353.
- ¹³⁹ *Scientex Corp.*, B-238689, June 29, 1990, 90-1 CPD ¶ 597.
- ¹⁴⁰ *Eagle Research Group, Inc.*, B-230050, May 13, 1988, 88-2 CPD ¶ 123.
- ¹⁴¹ *White Water Assocs., Inc.*, B-244467, Oct. 22, 1991, 91-2 CPD ¶ 356.
- ¹⁴² *Donald Clark Assocs.*, B-253387, Sept. 15, 1993, 93-2 CPD ¶ 168 at 4.
- ¹⁴³ *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.
- ¹⁴⁴ See, e.g., *N W Ayer Inc.*, B-248654, Sept. 3, 1992, 92-2 CPD ¶ 154.
- ¹⁴⁵ *Colbar, Inc.*, B-227555.4, Feb. 19, 1988, 88-1 CPD ¶ 168.
- ¹⁴⁶ See, e.g., *S and T Services*, B-252359, June 15, 1993, 93-1 CPD ¶ 464; *Cook Travel*, B-238527, June 13, 1990, 90-1 CPD ¶ 571.
- ¹⁴⁷ *Centex Construction Co.*, B-238777, June 14, 1990, 90-1 CPD ¶ 566.
- ¹⁴⁸ *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240.
- ¹⁴⁹ See *Telos Field Engineering*, B-251384, Mar. 26, 1993, 93-1 CPD ¶ 271.
- ¹⁵⁰ See *Telos Field Engineering*, note 249, *supra*; *S & G Industries, Inc.*, B255263, Feb. 1, 1994, 94-1 CPD ¶ 81.
- ¹⁵¹ *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71.
- ¹⁵² *Bell Free Contractors, Inc.*, B-227576, Oct. 30, 1987, 87-2 CPD ¶ 418.
- ¹⁵³ *Bionetics Corp.*, B-258106, Dec. 9, 1994, 94-2 CPD ¶ 231.
- ¹⁵⁴ *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3.
- ¹⁵⁵ *J. A. Reyes Assocs., Inc.*, B-230170, June 7, 1988, 88-1 CPD ¶ 536.
- ¹⁵⁶ *Analex Space Systems, Inc.*, B-259024, Feb. 21, 1995, 95-1 CPD ¶ 106.
- ¹⁵⁷ *Irwin & Leighton, Inc.*, B-241734, Feb. 25, 1991, 91-1 CPD ¶ 208.
- ¹⁵⁸ *Systematic Management Services, Inc.*, B-250173, Jan. 14, 1993, 93-1 CPD ¶ 41.
- ¹⁵⁹ *American Service Technology, Inc.*, B-255075, Feb. 4, 1994, 94-1 CPD ¶ 72.
- ¹⁶⁰ *Ogden Logistics Services*, B-257731.2, Dec. 12, 1994, 95-1 CPD ¶ 3; *Renow, Inc.*, B-251055, Mar. 5, 1993, 93-1 CPD ¶ 210.
- ¹⁶¹ *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188. See also *Ogden Government Services*, B-253794.2, Dec. 27, 1993, 93-2 CPD ¶ 339.
- ¹⁶² *Scheduled Airlines Traffic Offices, Inc.*, B-253856.7, Nov. 23, 1994, 95-1 CPD ¶ 33.
- ¹⁶³ *DRT Assocs., Inc.*, B-237070, Jan. 11, 1990, 90-1 CPD ¶ 47.
- ¹⁶⁴ *Scientific Management Assocs., Inc.*, B-238913, July 12, 1990, 90-2 CPD ¶ 27.
- ¹⁶⁵ *Abel Converting, Inc.*, B-224223, Feb. 6, 1987, 87-1 CPD ¶ 130.
- ¹⁶⁶ *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.

- ²⁶⁴ *Abt Assoc., Inc.*, B-253220.2, Oct. 6, 1993, 93-2 CPD ¶ 269.
- ²⁶⁵ *Moremont Corp.*, B-186276, Aug. 20, 1976, 76-2 CPD ¶ 181.
- ²⁷⁰ FAR § 9.104-1.
- ²⁷¹ FAR § 9.103(b).
- ²⁷² FAR § 9.103(c).
- ²⁷³ *Continental Maritime of San Diego, Inc.*, B-249858.2, Feb. 11, 1993, 93-1 CPD ¶ 230.
- ²⁷⁴ *Id.* at 7.
- ²⁷⁵ *PHE/Maser, Inc.*, B-238367.5, Aug. 28, 1991, 91-2 CPD ¶ 210; *Flight International Group, Inc.*, B-238953.4, Sept. 28, 1990, 90-2 CPD ¶ 257.
- ²⁷⁶ *Danville-Findorff, Ltd.*, B-241748, Mar. 1, 1991, 91-1 CPD ¶ 232; *Greyback Concession*, B-239913, Oct. 10, 1990, 90-2 CPD ¶ 278.
- ²⁷⁷ *Electrolux S.A.R.L.*, B-248742, Sept. 21, 1992, 92-2 CPD ¶ 192.
- ²⁷⁸ *McLaughlin Research Corp.*, B-247118, May 5, 1992, 92-1 CPD ¶ 422; *Wickman Spacecraft & Propulsion Co.*, B-219675, Dec. 20, 1985, 85-2 CPD ¶ 690.
- ²⁷⁹ *FMS Corp.*, B-255191, Feb. 8, 1994, 94-1 CPD ¶ 182.
- ²⁸⁰ *Southwest Resource Development*, B-244147, Sept. 26, 1991, 91-2 CPD ¶ 295; *Applied Research Technology*, B-240230, Nov. 2, 1990, 90-2 CPD ¶ 358.
- ²⁸¹ *A & W Maintenance Services, Inc.*, B-255711, Mar. 25, 1994, 94-1 CPD ¶ 214.
- ²⁸² *F&H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.
- ²⁸³ *Racal Guardata, Inc.*, B-245139.2, Feb. 7, 1992, 92-1 CPD ¶ 159.
- ²⁸⁴ *Suncoast Scientific Inc.*, B-240689, Dec. 10, 1990, 90-2 CPD ¶ 468.
- ²⁸⁵ *Central Air Service, Inc.*, B-242283.4, June 26, 1991, 91-2 CPD ¶ 8.
- ²⁸⁶ *Duke/Jones Hanford, Inc.*, B-249367.10, July 13, 1993, 93-2 CPD ¶ 26; *Instrument Control Service, Inc.*, B-247286, April 30, 1992, 92-1 CPD ¶ 407.
- ²⁸⁷ *Pacific Computer Corp.*, B-224518.2, Mar. 17, 1987, 87-1 CPD ¶ 292.
- ²⁸⁸ *Kunkel-Wiese, Inc.*, B-233133, Jan. 31, 1989, 89-1 CPD ¶ 98.
- ²⁸⁹ *Telos Field Engineering*, B-253492.6, Dec. 15, 1994, 94-2 CPD ¶ 240; *NITCO*, B-246185, Feb. 21, 1992, 92-1 CPD ¶ 212.
- ²⁹⁰ *Management & Industrial Technologies Assoc.*, B-257656, Oct. 11, 1994, 94-2 CPD ¶ 134; *Crimson Enterprises, Inc.*, B-243193.4, June 12, 1992, 92-1 CPD ¶ 512.
- ²⁹¹ *Meso, Inc.*, B-254730, Jan. 10, 1994, 94-1 CPD ¶ 62; *Aumann, Inc.*, B251585.2, May 28, 1993, 93-1 CPD ¶ 423; *Talon Corp.*, B-248086, July 27, 1992, 92-2 CPD ¶ 55.
- ²⁹² *PCL/American Bridge*, B-254511.2, Feb. 24, 1994, 94-1 CPD ¶ 142; *Technology & Management Services, Inc.*, B-240351, Nov. 7, 1990, 90-2 CPD ¶ 375.
- ²⁹³ *See Pannessa Co.*, B-251688, April 19, 1993, 93-1 CPD ¶ 333.
- ²⁹⁴ *Information Spectrum, Inc.*, B-256609.3, Sept. 1, 1994, 94-2 CPD ¶ 251; *Contraves USA, Inc.*, B-241500, Jan. 7, 1991, 91-1 CPD ¶ 17. See *Radiation Systems, Inc.*, B-222585.7, Feb. 6, 1987, 87-1 CPD ¶ 129.
- ²⁹⁵ *Communications Int'l Inc.*, B-246076, Feb. 18, 1992, 92-1 CPD ¶ 194.
- ²⁹⁶ *Mark Martens, The Best Value of "Risk": How to Account for the Probability of Negative Events*, Contract Management 47 (Mar. 1995).
- ²⁹⁷ *Delta Computer, Inc.*, B-225442, Feb. 9, 1987, 87-1 CPD ¶ 139.
- ²⁹⁸ *CACI, Inc.*, B-225444, Jan. 13, 1987, 87-1 CPD ¶ 53.
- ²⁹⁹ *John Brown U.S. Services, Inc.*, B-258158, Dec. 21, 1994, 95-1 CPD ¶ 35 at 10.
- ³⁰⁰ *Premier Vending*, B-256437, June 23, 1994, 94-1 CPD ¶ 380; *Advanced Resources Int'l, Inc.—Recon.*, B-249679.2, April 29, 1993, 93-1 CPD ¶ 348.
- ³⁰¹ *Individual Development Assoc., Inc.*, B-225595, Mar. 16, 1987, 87-1 CPD ¶ 290.
- ³⁰² *Liton Systems, Inc.*, B-239123, Aug. 7, 1990, 90-2 CPD ¶ 114 at 7-8.
- ³⁰³ *PCB Piezotronics, Inc.*, B-254046, Nov. 17, 1993, 93-2 CPD ¶ 286; *Triton Marine Construction Corp.*, B-250856, Feb. 23, 1993, 93-1 CPD ¶ 171.
- ³⁰⁴ *RAI, Inc.*, B-250663, Feb. 16, 1993, 93-1 CPD ¶ 140; *Earth Resources Corp.*, B-248662.2, Nov. 5, 1992, 92-2 CPD ¶ 323.
- ³⁰⁵ *Nicolet Instrument Corp.*, B-258569, Feb. 3, 1995, 95-1 CPD ¶ 48.
- ³⁰⁶ *SeaSpace*, B-241564, Feb. 15, 1991, 91-1 CPD ¶ 179.
- ³⁰⁷ *DUAL, Inc.*, B-252593.3, Aug. 31, 1993, 93-2 CPD ¶ 190.
- ³⁰⁸ *Michael C. Avino, Inc.*, B-250689, Feb. 17, 1993, 93-1 CPD ¶ 148.
- ³⁰⁹ *John Brown E & C*, B-243247, July 5, 1991, 91-2 CPD ¶ 27.
- ³¹⁰ *Cherry Hill Travel Agency, Inc.*, B-240386, Nov. 19, 1990, 90-2 CPD ¶ 403.
- ³¹¹ *Pickier Int'l, Inc.*, B-249699.3, Mar. 30, 1993, 93-1 CPD ¶ 275.
- ³¹² *See ALM, Inc.*, B-225589, May 7, 1987, 87-1 CPD ¶ 486.
- ³¹³ *Northwest EnviroService, Inc.*, B-247380.2, July 22, 1992, 92-2 CPD ¶ 38. See *Sperry Corp.*, B-225492, Mar. 25, 1987, 87-1 CPD ¶ 341.
- ³¹⁴ See Robert J. Kenney, Jr. & Daniel C. Sweeney, *Best Value Procurement*, Briefing Paper 93-4, Federal Publications Inc. (Mar. 1993).
- ³¹⁵ *Southern Commercial Industries, Inc.*, B-229969, April 25, 1988, 88-1 CPD ¶ 397.
- ³¹⁶ See *Corbetta Construction Co.*, B-182979, Sept. 12, 1975, 75-2 CPD ¶ 144.
- ³¹⁷ See Pushkar, Lent, & Hopkins, *Past Performance Evaluations*, Briefing Paper No. 94-6, Federal Publications Inc. (May 1994).
- ³¹⁸ 15 U.S.C. § 637(b)(7)(A).
- ³¹⁹ *RMS Industries*, B-247229, May 19, 1992, 92-1 CPD ¶ 451.

- ¹²⁰ *A & W Maintenance Services, Inc.*, B-258293, Jan. 6, 1995, 95-1 CPD ¶ 8; *VR Environmental Services*, B-246917, April 15, 1992, 92-1 CPD ¶ 370; *Pais Janitorial Service & Supplies, Inc.*, B-244157, June 18, 1991, 91-1 CPD ¶ 581.
- ¹²¹ *INTERLOG*, B-249613, Oct. 26, 1992, 92-2 CPD ¶ 282.
- ¹²² *D. M. Potts Corp.*, B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65.
- ¹²³ *IBIS Corp.*, B-224542, Feb. 9, 1987, 87-1 CPD ¶ 136.
- ¹²⁴ *F & H Manufacturing Corp.*, B-244997, Dec. 6, 1991, 91-2 CPD ¶ 520.
- ¹²⁵ *Data Systems Analysis, Inc.*, B-255684, Mar. 22, 1994, 94-1 CPD ¶ 209.
- ¹²⁶ *Docusort, Inc.*, B-254852, Jan. 25, 1994, 94-1 CPD ¶ 38; *Advanced Resources Int'l, Inc.*, B-249679, Nov. 18, 1992, 92-2 CPD ¶ 357.
- ¹²⁷ *Califone Int'l, Inc.*, B-246233, Feb. 25, 1992, 92-1 CPD ¶ 226; *Arrowsmith Industries, Inc.*, B-233212, Feb. 8, 1989, 89-1 CPD ¶ 129.
- ¹²⁸ *Renic Corp.*, B-248100, July 29, 1992, 92-2 CPD ¶ 60.
- ¹²⁹ *Clegg Industries, Inc.*, B-242204.3, Aug. 14, 1991, 91-2 CPD ¶ 145.
- ¹³⁰ See FAR § 9.104-1.
- ¹³¹ Quoted in Thirteenth Annual Report of the Select Committee on Small Business of the United States Senate, S. Rep. No. 104, 88th Cong., 1st Sess. at 31 (April 2, 1963).
- ¹³² 3 Comp. Dec. 437, 438 (1897).
- ¹³³ 7 Comp. Dec. 712, 714 (1901).
- ¹³⁴ 25 Comp. Dec. 398, 404 (1918).
- ¹³⁵ 32 Comp. Gen. 384, 387 (1953).
- ¹³⁶ 10 Comp. Gen. 294, 300 (1931).
- ¹³⁷ 20 Comp. Gen. 18, 21 (1940). Contract provisions are unauthorized unless reasonably requisite to the accomplishment of the legislative purposes of the contract appropriation. 18 Comp. Gen. 285, 295 (1938).
- ¹³⁸ 20 Comp. Gen. 18, 21 (1940).
- ¹³⁹ Unpub. Comp. Gen., A-33338 (Oct. 3, 1930).
- ¹⁴⁰ Unpub. Comp. Gen., A-26439 (April 12, 1929).
- ¹⁴¹ 31 U.S.C. § 1341.
- ¹⁴² FAR § 10.002(a)(4). See *Project Software & Development, Inc.*, GSBGA No. 8471-P, 86-3 BCA ¶ 19,082 at 96,403 (if expressions of actual requirements overstate an agency's needs, those expressions are improper).
- ¹⁴³ *Greenborne & O'Mara-Recon.*, B-247116.3, Oct. 7, 1992, 92-2 CPD ¶ 229 at 2-3.
- ¹⁴⁴ *East West Research, Inc.*, B-239516, Aug. 29, 1990, 90-2 CPD ¶ 178; *Consolidated Maintenance Co.*, B-220174, Nov. 12, 1985, 85-2 CPD ¶ 539.
- ¹⁴⁵ *Digital Equipment Corp.*, B-183614, Jan. 14, 1976, 76-1 CPD ¶ 21.
- ¹⁴⁶ *Janex Refrigeration Service*, B-221661.2, May 5, 1986, 86-1 CPD ¶ 431.
- ¹⁴⁷ *W.M.P. Security Service Co.*, B-256178, May 12, 1994, 94-1 CPD ¶ 303.
- ¹⁴⁸ *National Steel & Shipbuilding Co.*, B-250305.2, Mar. 23, 1993, 93-1 CPD ¶ 260; *Trident Systems Inc.*, B-243101, June 25, 1991, 91-1 CPD ¶ 604.
- ¹⁴⁹ *Mandex, Inc.*, B-241759, Mar. 5, 1991, 91-1 CPD ¶ 244.
- ¹⁵⁰ *Astro Pak Corp.*, B-256345, June 6, 1994, 94-1 CPD ¶ 352; *Marine Instrument Co.*, B-241292.3, Mar. 22, 1991, 91-1 CPD ¶ 317.
- ¹⁵¹ *Computervision Corp.*, GSBGA No. 8601-P, 86-3 BCA ¶ 19,266 at 97,409.
- ¹⁵² *Sierra Technology & Resources, Inc.*, B-243777.3, May 19, 1992, 92-1 CPD ¶ 450; *Microeconomic Applications, Inc.*, B-224560, Feb. 9, 1987, 87-1 CPD ¶ 137.
- ¹⁵³ *Paul G. Koukoulas*, B-229650, Mar. 16, 1988, 88-1 CPD ¶ 278.
- ¹⁵⁴ *American Contract Services, Inc.*, B-256196.2, June 2, 1994, 94-1 CPD ¶ 342; *SeaSpace Corp.*, B-252476.2, June 14, 1993, 93-1 CPD ¶ 462.
- ¹⁵⁵ *Arthur Anderson & Co.*, B-245903, Feb. 10, 1992, 92-1 CPD ¶ 168 at 4.
- ¹⁵⁶ *Id.*; *Cadmus Group, Inc.*, B-241372.3, Sept. 25, 1991, 91-2 CPD ¶ 271.
- ¹⁵⁷ *Midwest Research Institute*, B-240268, Nov. 5, 1990, 90-2 CPD ¶ 364; *Sparta, Inc.*, B-228216, Jan. 15, 1988, 88-1 CPD ¶ 37.
- ¹⁵⁸ *SEC, Inc.*, B-226978, July 13, 1987, 87-2 CPD ¶ 38.
- ¹⁵⁹ *Calspan Corp.*, B-258441, Jan. 19, 1995, 95-1 CPD ¶ 28.
- ¹⁶⁰ *Barran Builders & Management Co.*, B-225803, June 30, 1987, 87-1 CPD ¶ 645 at 4-5.
- ¹⁶¹ *Ogden Plant Maintenance Co.*, B-255156.2, April 7, 1994, 94-1 CPD ¶ 275 at 5.
- ¹⁶² *Benchmark Security, Inc.*, B-247655.2, Feb. 4, 1993, 93-1 CPD ¶ 133; *Wyle Laboratories, Inc.*, B-239113, Aug. 6, 1990, 90-2 CPD ¶ 107.
- ¹⁶³ See Paul Shnitzer & Thomas P. Humphrey, *The Scope of the Source Selection Official's Discretion*, Briefing Paper 94-5, Federal Publications Inc. (April 1994).
- ¹⁶⁴ *Contel Federal Systems, Inc.*, GSBGA No. 9743-P, 89-1 BCA ¶ 21,458 at 108,124.
- ¹⁶⁵ 19 F.3d 1342 (11th Cir. 1994).
- ¹⁶⁶ *East West Research, Inc.*, B-238633, June 13, 1990, 90-1 CPD ¶ 555.
- ¹⁶⁷ *Mart Corp.*, B-254967.3, Mar. 28, 1994, 94-1 CPD ¶ 215. In *Corbin Superior Composites, Inc.*, B-242394, April 19, 1991, 91-1 CPD ¶ 389 at 5, the Comptroller General said it would question the agency's determination of minimum needs only if it had "no reasonable basis."
- ¹⁶⁸ *JSA Healthcare Corp.*, B-252724, July 26, 1993, 93-2 CPD ¶ 54; *Federal Environmental Services, Inc.*, B-250135.4, May 24, 1993, 93-1 CPD ¶ 398.

- ¹⁰⁰ *General Crane & Haist, Inc.*, B-258819, Feb. 21, 1995, 95-1 CPD ¶ 99; *Family Realty*, B-247772, July 6, 1992, 92-2 CPD ¶ 6.
- ¹⁰¹ *Brunswick Defense*, B-255764, Mar. 30, 1994, 94-1 CPD ¶ 225; *COMSAT Int'l Communications, Inc.*, B-223953, Nov. 7, 1986, 86-2 CPD ¶ 532 ("We will question contracting officials' determinations only upon a clear showing of unreasonableness, abuse of discretion or violation of procurement statutes or regulations.")
- ¹⁰² *KPMG Peat Marwick*, B-255224, Feb. 15, 1994, 94-1 CPD ¶ 111.
- ¹⁰³ *Johns Hopkins Univ.*, B-233384, Mar. 6, 1989, 89-1 CPD ¶ 240.
- ¹⁰⁴ *D. M. Potts Corp.*, B-247403.2, Aug. 3, 1992, 92-2 CPD ¶ 65.
- ¹⁰⁵ *Pratt & Lambert, Inc.*, B-245537, Jan. 9, 1992, 92-1 CPD ¶ 48.
- ¹⁰⁶ *Aspect Telecommunications*, GSBGA No. 11250-P, 91-3 BCA ¶ 24,199.
- ¹⁰⁷ *Computer Lines*, GSBGA No. 8206-P, 86-1 BCA ¶ 18,653.
- ¹⁰⁸ *Materials, Communication & Computers, Inc. v. Defense Logistics Agency*, GSBGA No. 12930-P, 95-1 BCA ¶ 27,312.
- ¹⁰⁹ *TRW Inc.*, GSBGA No. 11309-P, 92-1 BCA ¶ 24,389.
- ¹¹⁰ *Lotecore International, Inc. v. United States*, note 365, *supra*, and cases cited at 1356.
- ¹¹¹ Acquisition Reform, 60 Fed. Cont. Rep. 235 (Sept. 13, 1993).
- ¹¹² Steven Kelman, *Procurement and Public Management I* (American Enterprise Institute Press 1990).
- ¹¹³ Pub. L. No. 103-355 (Oct. 13, 1994), 108 Stat. 3243.
- ¹¹⁴ *A Guide to Best Practices for Past Performance*, Office of Federal Procurement Policy (Interim ed. May 1995).
- ¹¹⁵ *Id.* at 13.
- ¹¹⁶ *Laidlaw Environmental Services, Inc.*, B-256346, June 14, 1994, 94-1 CPD ¶ 365 at 6-7.
- ¹¹⁷ *SDA Inc.*, B-256075, May 2, 1994, 94-2 CPD ¶ 71 at 6-7.
- ¹¹⁸ *Young Enterprises, Inc.*, B-256851.2, Aug. 11, 1994, 94-2 CPD ¶ 159 at 4-5.
- ¹¹⁹ Federal Acquisition Reform Act of 1995, Special Supplement, 63 Fed. Cont. Rep. No. 20 (May 22, 1995).
- ¹²⁰ *Id.* at S-7.
- ¹²¹ Acquisition Reform, 63 Fed. Cont. Rep. 641, 643 (May 22, 1995).
- ¹²² 141 Cong. Rec. H5912 (daily ed. June 14, 1994).
- ¹²³ *Id.* at H5926.
- ¹²⁴ *Id.* at H5936; 63 Fed. Cont. Rep. 743 (June 19, 1995).
- ¹²⁵ 141 Cong. Rec. H5924, H5926 (daily ed. June 14, 1995).
- ¹²⁶ *Id.* at H5930, 5931.
- ¹²⁷ *Id.* at H5932.
- ¹²⁸ FAR § 15.609(a).
- ¹²⁹ See Special Supplement, 63 Fed. Cont. Rep. No. 12 (Mar. 27, 1995).
- ¹³⁰ *Id.* at S-77.
- ¹³¹ FAR § 15.609(a); *Reliable System Services Corp.*, B-248126, July 28, 1992, 92-2 CPD ¶ 57.
- ¹³² *PeopleWorks, Inc.*, B-257296, Sept. 2, 1994, 94-2 CPD ¶ 89; *Aid Maintenance Co.*, B-255552, Mar. 9, 1994, 94-1 CPD ¶ 188.
- ¹³³ *ARC Professional Services Group, Inc. v. General Services Administration*, GSBGA No. 12699-P, 94-2 BCA ¶ 26,845 at 133,573; *Integrated Systems Group, Inc.*, GSBGA No. 11156-P, 91-2 BCA ¶ 23,961 at 119,956.
- ¹³⁴ *EER Systems Corp.*, B-256383, June 7, 1994, 94-1 CPD ¶ 354; *Information Systems & Networks Corp.*, B-220661, Jan. 13, 1986, 86-1 CPD ¶ 30.
- ¹³⁵ *Telecom Systems Services, Inc. v. Department of the Interior*, GSBGA No. 12993-P, 95-1 BCA ¶ 27,346; *Information Ventures, Inc.*, B-243929, Sept. 9, 1991, 91-2 CPD ¶ 227.
- ¹³⁶ *National Systems Management Corp.*, B-242440, April 25, 1991, 91-1 CPD ¶ 408; *StaffAll*, B-233205, Feb. 23, 1989, 89-1 CPD ¶ 195.
- ¹³⁷ 141 Cong. Rec. H5930-31 (daily ed. June 14, 1995).
- ¹³⁸ *Pendus Building Services, Inc.*, B-25721.3, Mar. 8, 1995, 95-1 CPD ¶ 135 (even acceptable proposals with no reasonable chance of award can be excluded); *Better Service*, B-256498.2 Jan. 9, 1995, 95-1 CPD ¶ 11 (proposal lacking sufficient information to determine compliance can be excluded without discussions).
- ¹³⁹ See notes 10, 11, and 12, *supra*.
- ¹⁴⁰ Edward Felsenthal, *Weekend Warriors Find a New Arena: Court*, Wall St. J., June 23, 1995, at B1.
- ¹⁴¹ Robert Bolt, *A Man For All Seasons* 66 (Vintage International 1990).

Hearing before the
United States House of Representatives
Committee on Small Business

Testimony of

Matthew S. Forelli
President
Precision Gear, Inc.
Corona, New York

on behalf of
The American Gear Manufacturers Association
Alexandria, VA

August 3, 1995

Thank you, Madam Chairman and distinguished members for scheduling this follow-up hearing on HR 1670. It is fortunate for the small business community that someone understands the limited resources under which we function and the fact that we need strong advocates here in Washington to even begin to give us a fighting chance.

My name is Matt Forelli and I am President of Precision Gear Inc., in Corona, New York (Queens). I appeared before you four weeks ago on this same topic. For 58 years we have manufactured the flight safety critical high precision gearing purchased by the Department of Defense for its weapons systems such as the sample you see before you. Our gearing products are integral parts of the air frames and drive systems as well as the engines that power them, including the Apache helicopter, the Abrams tank, the Blackhawk, the CH-53E, and the F-404, T-700, T-64, T-55 and T-53 engines. Precision Gear Inc. employs 100 people in the New York metropolitan area. Due to the downturn in the defense market we recently laid off 22 highly skilled workers and closed a plant in Mr. Flake's district.

I am here today as a representative of the American Gear Manufacturers Association, the trade association representing 350 gear companies. Our membership is 95% small businesses, and many of us participate in the break out program.

I won't attempt to address every item of HR 1670, but will focus primarily on the importance of free and open competition. At your last hearing, I discussed the importance of the language ensuring free and open; explaining that any attempt to weaken it and shift the discretion to the contracting officers would effectively eviscerate the law. However, it would seem that we didn't drive home that message hard enough, and now we are faced with a massaged version of the original which is an attempt to placate small businesses. Let me make this perfectly clear at the outset: *any compromise of free and open competition is unacceptable.*

As a small contractor, I have been watching as the pendulum has swung from the \$500 toilet seat to full and open competition and now back again. The spares business that prime contractors were willing to overlook during the defense build up has become more attractive to them under current market conditions.

I'd like to put the value of competition in context: if you were to take an average passenger vehicle and rebuild it totally using replacement parts, it would cost three times the price of the original car. A recent article in the Wall Street Journal noted that a chop shop can net two to four times a car's original value by selling it in parts. My point here is simple: spare parts are a lucrative business if you can control the competition.

Any small supplier can tell you that the move to restrict competition is **the trend**. In my previous testimony I referred restriction of competition as **the hidden agenda**. Restriction of competition is the hidden agenda in the battle over technical data; it is the hidden agenda in contract bundling; and it is the hidden agenda in ongoing attempts to impose unprecedented testing requirements on potential suppliers.

The real driving force behind the Federal government's efforts in these areas is the original equipment manufacturers (OEMs), i.e. prime contractors, i.e. large companies. The true impact of these efforts is not in step with the deficit reduction mindset of the current Congress, so they "spin" restriction of competition under the label of "reform" or "streamlining" or "encouraging innovation" or "ensuring quality." Historically, the larger companies have been the assemblers of components supplied by small businesses such as Precision Gear, and now they are seeking to control that supply process.

It is amazing to us as small businesses to see the Congress wrestle with the details of deficit reduction and simply pass over an item which will have as much impact on Federal budget as this simple language change will. One wonders if the real reformers in Congress have a real world understanding of the effect of competition on procurement in the scale managed by the Federal government.

Proponents of this legislation talk about savings through bureaucratic streamlining, and *neglect to consider the impact of the very competition they are seeking to restrict*. They are looking at the short term savings generated by envisioned cuts in administration. However, when the smoke clears the savings will pale in comparison to the overcharges the taxpayer will be paying *ad infinitum* for spare parts -- through the life of the weapons systems. And lives of weapon systems seem to be getting longer and longer these days.

Many studies have documented savings through competition. Back in 1993 we did our own study at AGMA to establish the impact of competition on the defense budget. We contacted the Army, Air Force, Navy and Defense Logistics Agency, requesting their records on dollars competed and percentage of buys competed. The general rule of thumb is that savings resulting from competition is anywhere between 25 and 200 percent over sole sourcing. One study by the Air Force demonstrated that the first time competition is introduced in a procurement, savings averages 25%; the second time it jumps to 28 to 30%. By applying a conservative savings estimate (25%) to the dollars competed by the different buying commands we calculated that DoD alone saved close to **\$20 billion** through competitive processes in one year. Realistically, the number is probably much higher. Multiply that by the ten years CICA has been in effect and you have almost realized enough savings to offset DoD's entire budget for one year.

In my last testimony I cited examples of the impact of restricted competition at Kelly Air Force Base. In one example, two independent contractors were providing a flame holder for the F-100 engine to the Air Force for about \$5,000, depending on the size of the buy. When the Air Force restricted the purchase to the prime contractor they began paying \$15,000 to \$16,000 per flame holder. As an addendum, one of the two companies is now out of business.

Before 1985, sources other than the Original Equipment Manufacturers OEMs did not have a fair opportunity to compete. For years Kelly bought thousands of parts called a "divergent nozzle segment" for the F-100 engine at a unit price of over \$2,400. When competition was introduced the price dropped to \$1,234. Even the prime contractor's bid dropped \$1,000 per unit.

Although we have had only a short time to review the text of the revised HR 1670, we stand by our previous statement.

In our view, nothing has changed with regard to the impact on competition. While the bill maintains the appearance of the current standard and applicability of free and open competition, it eliminates it in practice. For one thing, the bill increases the potential for use of other than competitive procedures under two new exceptions (not "appropriate" or "feasible.") A major concern is the conditioning of the use of competitive procedures through "consistent with the need to efficiently fill the Government's requirements," which will be left to the regulation writers to define.

We believe that there are other ways to cure the problems cited with free and open competition. These include more concise descriptions of the solicitations; information on other solicitation inquiries; and greater information about the evaluation criteria to be used, for example.

We are still concerned about the Verified Contractor System. Under current practice, companies such as ours qualify to make a part through the Source Approval Request (SAR) process. Through this process we prove to the purchasing agency that we have previously made the part or a justifiably similar part. The SAR process is open to everyone; it screens out the unqualified and leaves the real competition to the few qualified bidders.

However, HR 1670 would eliminate most statutory protections to an open process, leaving the definition, again, to the regulation writers. It also seeks to add in past performance criteria, when there is no reliable method in place to collect such data. In fact, last year's FASA regulations on past performance in award of individual contracts are only now being implemented.

The concept of creating a class of verified contractors is troubling to us because it is unclear to us how this is different from current practice of having lists of qualified producers under the SAR process. If the intention is to eliminate qualified bidders lists, we are strongly against it.

Again, I would like to remind the committee that the Competition in Contracting Act accomplished three fundamental principles of DoD procurement:

- It saved DoD money;
- It maintained quality; and
- It proved to the American public that DoD could provide responsible stewardship of the taxpayers money.

HR 1670 would undermine much that was accomplished by CICA, so my message to you today is: **please think carefully before you dismantle those accomplishments.**

Again, I congratulate the committee for stepping into this process and ensuring that small businesses get a fair hearing on their side of these issues. I would be happy to answer any questions any of you may have.

STATEMENT OF

**JERE W. GLOVER
CHIEF COUNSEL FOR ADVOCACY
U.S. SMALL BUSINESS ADMINISTRATION**

BEFORE THE

**U.S. HOUSE OF REPRESENTATIVES
COMMITTEE ON SMALL BUSINESS**

AUGUST 3, 1995

Good morning, Chairwoman Meyers and members of the committee. I am Jere Glover, the Chief Counsel for Advocacy in the U.S. Small Business Administration.

I am pleased to appear before the Committee on Small Business and I thank you for the opportunity to share the views of the Office of Advocacy¹ regarding amendments to H.R. 1670, the Federal Acquisition Management Reform Act of 1995.

Small business represents a critical and very important sector of our economy. Much of our nation's economic activity and growth can be traced to the small business community. Small firms employ almost 60 percent of the work force, are responsible for creating most new jobs and produce the largest share of significant innovations.

However, small, small disadvantaged and women-owned firms receive a relatively small piece of the government procurement pie. As I have mentioned in prior testimony before this committee, seven government prime contractors, together, received more federal contract dollars in FY '94 than all small businesses combined.

The share of federal procurement dollars currently received by the small business community is disproportionate to the benefit small firms provide the economy. This raises the basic policy question, how should we be spending our procurement dollars? If it is in the national interest to promote competition, i.e. by promoting small firms, then we need to ensure that procurement dollars are spent to further that objective, rather than making it easier than before to do business with an increasingly smaller cadre of businesses.

About a month ago, I appeared before this committee to outline the views of the Office of Advocacy on an earlier version of H.R. 1670. At that time, I and numerous other small business representatives expressed deep concern about provisions in the bill that would substitute "full and open competition" standards with standards based on "maximum practicable competition."

Since the June 29 hearing, I have met with Chairman Clinger and members of his committee staff to discuss the concerns of the small business community. I was and continue to be encouraged by the receptivity and willingness of the Chairman and his committee staff to consider alternative language and provisions in H.R. 1670. The amendments we are considering today are an improvement over the original bill.

¹ The views expressed in this testimony are solely those of the Chief Counsel for Advocacy and may not necessarily reflect the views of the U.S. Small Business Administration or the Administration.

However, although improved, the amendments do not reach far enough in mitigating the serious concerns of the small business community. The words "maximum practicable" competition are gone. But, the current standard of "full and open" competition is diluted. The revised bill would require the government to obtain competition that provides "open access" and promotes efficiency in fulfilling the government's procurement requirements.

What does this really mean? Frankly, we won't know until the regulation writers prepare implementing rules. However, the way the bill is drafted, contracting officers would have significant latitude in determining the level of competition sought as well as what's considered "efficient" for the government.

In addition, the amendments would allow limited competition or even no competition when the use of competitive procedures is deemed not feasible or appropriate. Standards for such decisions would be developed in regulations. In other words, the details regarding when competitive procedures need be applied would be left to the regulation writers.

Unfortunately, as I have testified in the past, government rule writers have too often taken liberties in interpretation and do not always consider concerns of the small business community. In fact, two weeks ago I echoed these very sentiments before this committee regarding the implementation of the Federal Acquisition Streamlining Act (FASA).

Let me give you an example. A key provision of FASA is the creation of a government-wide electronic commerce system for federal procurements. My office has strongly supported this.

The proposed rule implementing electronic contracting (FACNET) was published in March of this year. The Office of Advocacy and the small business community, after reviewing this proposed regulation, were very concerned that the rule exceeded the intent of the law, especially with regard to fees that would be charged to small firms wanting to gain access to the government's electronic commerce system. We were also concerned that the rule did not sufficiently comply with the Regulatory Flexibility Act in assessing the impact of the regulation on small firms.

Advocacy addressed the small business concerns at a regulatory public meeting and in a written statement, as well as in an eight page comment letter to the FAR Council.

A few weeks ago this rule was published as an interim final rule, without addressing any of the small business concerns. The rule even includes a statement justifying its publication as an interim final rule saying "there were no substantive comments presented." I ask you..., are small business issues not substantive? This is a perfect example of why we do not want to

leave sweeping interpretations of procurement law to the rule writers. Unfortunately, their track record has not engendered trust within the small business community.

Madam Chair and members of the committee, the words say full and open competition, but in reality the way the amendment is drafted, I believe a contracting officer would be able to apply limited, convenient or "maximum practicable" competition standards.

Competition is, and always has been, the basis of free enterprise and the foundation supporting our economy and is maintained when there is a vital small business component. Historically, the government has found that competitive acquisitions accomplished through small firms are generally at lower costs. H.R. 1670, as amended, would, we believe, reduce the number of participating government contractors and have harmful effects on competition.

The bill would also establish a verification system or system made up of "verified" firms that have met certain past performance or pre-qualification standards with the government. The use of pre-qualification has the effect of denying to small business offerors the Congressionally mandated right to a second party review of the firm's qualifications to perform, a right that is established in SBA's Certificate of Competency (CoC) Program.

In addition, H.R. 1670 would allow commercial item acquisitions, regardless of dollar value, to be made pursuant to the simplified, commercial-type acquisition procedures which are currently authorized only for acquisitions below the simplified acquisition threshold.

While we support efforts to increase efficiencies in public procurement by reducing operating costs, purchasing all commercial items by use of simplified acquisition procedures could be particularly harmful to competition and to the cost of government purchases in the long-run --- offsetting any savings achieved in operating costs.

Specifically, the notice requirements are significantly modified for simplified purchases. This change would mean that small businesses would not have ready access to information concerning a greater number of procurement opportunities. To put it another way, a significant portion of the government's \$200 billion in purchases could, under FASA, be classified as commercial items and, with this amendment, be purchased with simplified procedures. The simplified acquisition threshold was just raised to \$100,000 in FASA, and the procedures have not even been implemented yet. Without knowing the impact of this major change, it seems premature to introduce another change that could hurt competition significantly.

Where the Office of Advocacy has concerns with certain provisions of H.R. 1670, especially those that would restrict competition, we applaud section 301 which would amend the OFPP Act to include a statement affirming that it is the policy of the government to rely on the private sector to supply its needs. We also strongly endorse section 38 in the bill which would set standards and training criteria for contracting officers. This is a needed provision and an excellent addition to the bill.

The small business community is very concerned because many procurement reform changes are happening quickly and without a full understanding of the impact on small business. Unfortunately, short-term efficiencies in process appear to be winning the battle over long-term tenets promoting competition, least purchase cost, and small business development.

The small business community is NOT looking for preferential treatment or preference programs. Small firms want FULL and OPEN access and a level playing field. Not only do they have a right to fair treatment, but it makes sound economic sense for small firms to play a significant role in federal procurements. Small firms have consistently demonstrated their capacity to foster competition, promote innovation, create jobs and provide long-term government savings.

In closing, H.R. 1670 has come a long way and I commend the Members and committees who have worked on this legislation. However, it would, in my opinion, be a mistake to alter the "full and open competition" language of current law until we see

1) how last year's major procurement reform has been fully implemented, and

2) how small business is treated in the drafting of the implementing rules.

Early examination of the proposed implementing rules does not give us great assurance that small business is faring well.

Thank you for an opportunity to share the views of the Office of Advocacy.



**TESTIMONY OF THE
HEALTH INDUSTRY MANUFACTURERS ASSOCIATION
BEFORE THE
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES**

**ON THE
FEDERAL ACQUISITION STREAMLINING ACT**

**PRESENTED BY
THOMAS R. GUNERMAN
PRESIDENT AND CEO
INTERSURGICAL INCORPORATED**

AUGUST 3, 1995

World Leaders in Health Care innovation

**1200 G STREET, N W . SUITE 400
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TESTIMONY OF THE HEALTH INDUSTRY MANUFACTURERS ASSOCIATION

Good afternoon. My name is Tom Gunerman and I am the President and CEO of Intersurgical Incorporated, a small medical manufacturing company located in Liverpool, New York. I'm here today representing the Health Industry Manufacturers Association (HIMA) to convey the concerns of the health care technology industry about implementation of the Cooperative Purchasing program legislated as part of the Federal Acquisition Streamlining Act (FASA). I urge you to reconsider the appropriateness of the Cooperative Purchasing program for health care and perhaps other industries as well.

HIMA is the principal trade association of the medical technology industry, and it represents more than 700 manufacturers of medical devices, diagnostic products, and health information systems, along with component manufacturers and manufacturing services suppliers. According to the definition of the Small Business Administration, 75% of HIMA's companies are small businesses. Together, all HIMA companies manufacture approximately 90% of the \$50 billion of health care products sold in the United States annually.

Today I would like to present three specific points about the Cooperative Purchasing program of FASA that might produce results unintended by the framers of the original legislation last year:

- Costs imposed on the Federal government will likely rise as a result of the Cooperative Purchasing program;
- Because the Federal and non-federal customers differ significantly, small businesses will be seriously disadvantaged.
- A disruption in the distribution channels for health care products could cause the quality of care to be compromised.

We do not object to the reform of FASA -- only to implementation of a program without complete information on its broad effects. In describing these three concerns, I'll demonstrate, through examples in the health care industry, why FASA's Cooperative Purchasing program should not be implemented.

Cost Increases for the Federal Government

HIMA requested an economic review of the program to determine what lay beneath the surface in the proposal to expand access to the Federal Supply Schedule (FSS) for state and local governments. As a result of the review, conducted by the Washington D.C. firm of Muse & Associates, we learned that the Federal government has had prior experience with a similar

economic concept through the Medicaid program. As part of OBRA 1990¹, pharmaceutical companies were required to offer the same discounted rates to all state Medicaid programs that were traditionally offered to their "best customers." It was known as the Medicaid prescription drug rebate program.

General economic and business theory suggests that all discounts decline as the share of the market receiving deep discounts expands. Data from the 1991 implementation of the Medicaid prescription drug rebate program to the present show that deep discounts decreased by approximately 31 percent when Medicaid -- about 15% of the pharmaceutical market -- began to benefit from deep discounts given to other providers.

Like the program under discussion today, the Medicaid market sounds large at 15%, but it is actually 54 separate programs for the states, the U.S. territories, and the District of Columbia. Assuming similar behavior by FSS suppliers from similar market pressures, **Federal government costs will increase by approximately \$1.35 billion per year, or \$11.3 billion over seven years, as a consequence of expanding FSS access to the additional health care providers.** In the interest of the Committee's time, I will submit the details of the analysis for the record and move on to my other two points.

Distinctly Different Customers

Federal and non-Federal purchasers are two entirely different customers. While the *volume* of their purchases illustrates the most obvious difference, many other distinctions can be drawn which would make successful implementation unlikely. For instance:

- *Post-sale services* -- Federal purchasers, such as VA hospitals, might buy the product alone; state or local entities often require additional services such as demonstrations, training, or frequent recalibration of equipment.
- *Electronic Communication* -- Federal buyers communicate electronically, placing orders using electronic data interchange (EDI), and submitting payment by electronic funds transfer (EFT). State and local governments are far less likely to have such capacity requiring instead time-consuming, labor-intensive paper processing for the manufacturer and the customer alike.
- *Credit Arrangements* -- Federal buyers generally pay within 15 days. Non-Federal buyers take 2-3 months, on average, and sometimes over one year to complete payment for orders, placing a heavy financial burden on the manufacturers.

While these differences are challenging for any company -- large or small -- it is the smaller company at greatest risk where the credit arrangements are concerned. As an example, if a

¹ Omnibus Budget Reconciliation Act of 1990

company has negotiated a contract to supply a Federal purchaser, the conditions of the contract are based on the factors I just described -- particularly the certain and quick payment by the Federal buyer. A smaller government buyer may match some of the traits of the Federal customer but differ greatly in others.

For example, a large city hospital system might be able to order in the volume approaching that of a Veterans' hospital, but what happens to the smaller company if that customer fails to pay on time -- perhaps nine months to a year? This is a business hazard for any sized company, but will the smaller companies have the "wear with all" to survive a severely diminished cash flow? Will a few slow paying customers ultimately drive small companies away from Federal business?

We already serve state and local health care providers and want to continue to do so, but the contracts need to be tailored to the needs of each customer. Because, under a "one size fits all" concept, it becomes extremely difficult for a manufacturer to structure a single contract that will meet the diverse needs of Federal as well as state and local buyers.

Underlying these basic concerns is the fact that many HIMA members do not distribute the product themselves. Rather, they rely heavily upon distributors as a vital link to make these products available. Many of these distributors are themselves small businesses -- highly specialized to serve either Federal or state and local agencies. These distributors are trained in the installation and servicing of particular categories of products. Making state and local agencies eligible for the FSS and its contract arrangements could dramatically shift existing distributor relationships, as well as impose burdens where there is insufficient capacity to manage the increased volumes or different product lines.

Compromising the Quality of Care

HIMA is concerned that the plan may have adverse effects on the present system and might jeopardize the continuity of service for life saving, quality enhancing medical products. The plan might also result in some dislocation among distributors, and many manufacturers could not easily fill the void if such displacement occurs. It would be extremely difficult to operate through a changed network of distributors, especially if they are untrained in the technical and clinical applications of specific medical equipment.

Summary

In summary, the economic analysis showed that original legislation -- well intended -- may well have the opposite effect. I ask you to again consider HIMA's three points before passing reform legislation including a program not yet implemented:

- The added cost to the Federal government of over \$1.3 billion per year,

- The differences between the Federal and the non-Federal customer -- especially how the credit arrangements can disadvantage smaller businesses, and
- The disruption to the current system and how the quality of patient care could be compromised.

Then, Mr. Chairman, we ask that you and other members of the Committee work with the Committee of jurisdiction to amend the Federal Acquisition Reform Act (H.R. 1670) is on the floor in September to save the government over \$1.3 billion dollars annually.

The scope of responsibility of the Federal government would have to be expanded to accommodate the new program. At a time when Congress is making progress toward downsizing and decentralizing government, should we enlarge government and risk increasing its costs?

Thank you for inviting me to represent HIMA today while you consider these issues critical to small businesses. HIMA is glad to assist your study on this issue in any way we can.

(Attachment)

STATEMENT OF
EDWARD HAMMOND
K.C. Bobcat, Inc.
and the
NORTH AMERICAN EQUIPMENT DEALERS ASSOCIATION
Before the
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVES
On
FEDERAL ACQUISITION REFORM
August 3, 1995

Good morning Madam Chairman and members of the Committee. My name is Ed Hammond. I am a 50% owner of K.C. Bobcat, Inc. I want to especially thank Congresswoman Jan Meyers, for holding this hearing on H.R. 1670, the Federal Acquisition Reform Act of 1995. I have a store in Olathe, Kansas in your district and have a large number of your constituents as customers and employees.

One of the purposes of H.R. 1670 is to correct problems resulting from enactment of the Federal Acquisition and Streamlining Act of 1994 (FASA '94). Section 1555 of FASA '94 would allow the General Services Administration (GSA) to act as a purchasing agent for state and local government. Our hope is that H.R. 1670 will be amended to repeal Section 1555 of FASA '94. We welcome the opportunity for further discussion of the problems with Section 1555. It is particularly appropriate in this forum, since Section 1555 has such a devastating impact on small businesses which have state and local governments as customers.

I am submitting this statement on behalf of myself and the North American Equipment Dealers Association (NAEDA), which is a member of a coalition of small independent businesses seeking repeal of Section 1555. The other members of the coalition are listed at the end of this statement. NAEDA represents over 5,500 farm, industrial, construction, and outdoor power equipment dealers across the United States. NAEDA members sell and service off-road equipment used in farming, numerous manufacturing and service industries, construction, road building, and lawn and ground maintenance. Each dealership provides a service shop for maintenance and repair of new and used equipment. The average number of employees at a dealership is 17.

Our dealership sells and repairs Bobcat brand small loaders and excavators to contractors,

municipalities, counties, farms and industry. Approximately 20% of my business is sales to local government such as the City of Overland Park, Kansas; the City of Shawnee, Kansas; the City of Leavenworth, Kansas; the City of Olathe, Kansas; the City of Lansing, Kansas; the City of Lenexa, Kansas; the City of Fairway, Kansas; Johnson County, Kansas; Douglas County, Kansas; and the Kansas City, Kansas Housing Authority.

On April 7 of this year GSA published a proposal in the Federal Register listing the federal supply schedules which GSA would make available to state and local governments. These schedules encompass a wide variety of products including tires, tractors, school supplies, office furniture and medical equipment. (60 Fed. Reg. 17764). All of these items are currently being supplied to these governmental entities through existing networks of dealers, distributors and retailers who employ people locally. Sales to state and local governments frequently represent a significant portion of these dealers' revenues.

Although the purported intent of the FASA '94 is to create more efficient purchasing for the federal government, there is virtually nothing in the legislative history to explain the intent of Section 1555 which allows GSA to purchase supplies for all state and local governments. Moreover, creating a new and presumably large bureaucracy to coordinate state and local government purchases through GSA cannot and will not promote efficiency at the federal acquisition level. In fact, as far as we know, the law which authorizes GSA to go into competition with us was not supported by any evidence that there is a need for GSA's interference. Currently, most state and local governments purchase on a competitive bid basis, guaranteeing them the best price. Under this new proposal, GSA intends to charge state and local governments for use of the schedules. State and local governments will not be saving any

money. They will be paying transaction costs to GSA instead of to their local dealer. GSA will replace the local dealer. Perhaps most important is the fact that neither now nor at the time of passage was there a shred of evidence that Section 1555 would reduce costs to state and local governments. Actually, the law allows GSA to charge those governments an unspecified fee for its "services."

On the other hand, if one assumes that GSA is seeking to reduce its costs, Section 1555 will not achieve that goal. It is not possible for GSA to negotiate lower prices through a larger market share because GSA already receives the lowest possible prices, buying directly from the manufacturer on a competitive bid basis. Additionally, a new bureaucracy at GSA to administer this program will only add to its overall costs.

From what we can determine, this whole idea is the product of someone who thinks that big government is good and that it can only get better if it is made bigger. That individual clearly has not gotten the message from the American people who are outraged at the size of government and who want to see it reduced.

Any alleged benefit of the GSA rule will be outweighed greatly by the harm which it will inflict on local equipment-dealers of all types throughout the country. Dealerships survive on a combination of income from sales and service. Neither, standing alone, will support the dealership. Thus, if GSA becomes the purchasing agent for state and local government, dealers will lose sales on a nationwide basis. The dealership networks will be weakened substantially. It has been estimated by one of the major equipment manufacturers that sales to local governments, excluding state governments, account for twenty percent (20%) to as much as fifty percent (50%) of dealers' sales. It takes little imagination to understand the impact upon a small

business if 20% of its sales are taken away by the federal government.

The injury will not be limited to the dealers, their employees and their families. Citizens of the communities in which the dealerships are located will experience a loss as well. The equipment dealer is the main source of power equipment for many communities. A financially weakened or closed dealership is of no benefit to the community.

The loss of jobs at the dealership will inflict harm on the community at large as employees and their families are left without a source of income. Thus, in addition to losing a valuable resource, the community will incur a burden as a result of the damage which this purchasing program will cause.

Finally, the state and local governments themselves will be damaged by this program. The type of equipment described in the above-referenced schedules requires regular servicing. Only equipment dealers have the capability of servicing and repairing equipment. Manufacturers are not set-up to service equipment. And they will never be since it is logistically impossible to send a tractor, or a chain saw, or a lawn mower, as examples, back to a manufacturer for service. Therefore, there should be very serious concern on the part of state and local governments about a loss of service for their current equipment as well as for equipment purchased through GSA.

There will be a loss of the many intangibles which permeate the dealer customer relationship. When state and local government officials purchase a backhoe, or tractor, or mulcher from a local dealer they also create a relationship which they can rely on for warranty and repair advice; and they have a ready source of help when minor problems arise. This kind of friendly help and advice will not exist where GSA is the selling agent. Just as importantly,

local dealers are available to modify the equipment to meet local government specifications and negotiate specific terms to suit the local agency. Clearly, these needs will not be met if state and local officials buy equipment through GSA.

The easy answer, that state and local governments will not use the GSA schedules if all of the foregoing are true, is fallacious. State and local governments will be forced to use the GSA schedules if the initial price of an item or article is even slightly lower. Further, even if only a few governments begin using the schedules at the outset, the erosion will be gradual and the dealership network slowly will wither.

There is no justification for interference by the federal government in the current sales system which has been in place for many decades. In this era of reduced government, it is incomprehensible that an expansion of GSA into state and local government purchasing, at the expense of small business across the country, would be permitted. To add insult to injury, GSA intends to charge a fee for its services. GSA would not only compete with small business; it would also get paid to do so.

In closing, I would like to urge the Congress to consider the impact upon the private sector, particularly small business when attempting to reform federal acquisition programs. While we all agree that an overhaul is necessary, haste in accomplishing this can work to the detriment of the suppliers such as the members of our coalition:

North American Equipment Dealers Association
 Associated Equipment Distributors
 National Automobile Dealers Association
 National Retail Federation
 National Association of Wholesaler-Distributors
 National Association of Chemical Distributors
 Allied School & Office Products
 Interstate School Supply & Equipment

Interstate Companies of Louisiana

Interstate of Florida

Mississippi School Supply Co.

Material Handling Equipment Distributors Association

Health Industry Manufacturers Association

Again thank you Madam Chairman for the opportunity to air this issue.



DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

STATEMENT OF

KEVIN W. JOHNSON

CONTRACTING OFFICER

INTERNAL REVENUE SERVICE

ASSISTANT COMMISSIONER (PROCUREMENT)

OFFICE OF CONTRACT ADMINISTRATION

BEFORE THE

COMMITTEE ON SMALL BUSINESS

UNITED STATES HOUSE OF REPRESENTATIVES

AUGUST 3, 1995

Good morning Chairwoman Meyers, Representative LaFalce, and members of the Committee. I appreciate the opportunity to appear before you today to share my views on H.R. 1670, "The Federal Acquisition Reform Act of 1995" and to briefly elaborate on the role of the Contracting Officer in this era of procurement reform.

Introduction

My name is Kevin W. Johnson and I am presently employed at the Internal Revenue Service (IRS), Oxon Hill, Maryland, as a Contract Administrator and Contracting Officer within the Office of Contract Administration. I have eleven years of progressive

experience in the career field of federal government contracting. In that period of time, I have awarded and managed over sixty government contracts at two defense agencies and two civilian agencies, with a systems life value ranging between \$85,000 and \$1,000,000,000. This includes a variety of contract types as well as a variety of products and services (resume attached for the record).

Background

As an advocate of the administration's efforts to streamline the federal procurement process, I was pleased to write to Dr. Steven Kelman, Administrator, Office of Federal Procurement Policy, on December 12, 1994, to share a success story relative to how I have taken personal responsibility to make the procurement process better where I work (letter attached for the record as a featured article in Contract Management magazine, August 1995 issue). As a frontline procurement professional in the federal sector, and particularly as a Contracting Officer, I feel empowered to manage those contracts, delivery orders and task orders that have been assigned to me by utilizing the foresight, flexibility and acumen that is deserving of the American taxpayer, our government contractors and the IRS. This feeling of empowerment is driven, in large part, by Dr. Kelman's willingness to listen to the concerns of procurement professionals, at my level, who have the ultimate responsibility to award and manage today's increasingly complex contracts. To that end, Dr. Kelman invited me to accompany him to this

morning's hearing to testify on the aforementioned reform legislation.

"Federal Acquisition Streamlining Act of 1994" (FASA) and H.R. 1670, "Federal Acquisition Reform Act of 1995"

In my view, FASA and H.R. 1670 enhance and promote competition for federal procurement opportunities amongst small business concerns. Consistent with three of the twenty initial goals for reinventing government procurement¹, establishment of a new simplified acquisition threshold (increase from \$25,000 to \$100,000) and procedures², enhancing programs for small businesses and small disadvantaged business concerns and bringing past performance into the evaluation process³, small business concerns now have an opportunity to compete for more government contracts. These actions facilitate their chances to retain those contracts, as well as subsequent contractual opportunities, through outstanding performance. Pursuant to Title I, Section 101, of H.R. 1670, I envision the pending legislation to improve competition requirements for the acquisition of goods and services as a step in the right direction. Furthermore, I endorse the administration's position

¹Creating a Government that Works Better & Cost Less, Reinventing Federal Procurement, Accompanying Report to the National Performance Review, September 1993.

²"Federal Acquisition Streamlining Act of 1994", Title V, October 13, 1994.

³"Federal Acquisition Streamlining Act of 1994", Title I, Part II, Subpart III, Section 1091, Policy Regarding Consideration of Contractor Past Performance".

that the definition of "maximum practicable competition" should replace the current requirement which states that all sources must be given a "right" to be considered for government contracts. It is simply not cost effective to continually consider sources that have no realistic chance of supplying goods and/or services at a reasonable price to the government. In my view, the Contracting Officer should not be obligated to notify a vendor that they are in the competitive range, that is, stand a chance to be selected as the successful offeror when, in fact, it is known early in the procurement process that said vendor may not perform, does not offer a fair and reasonable price and/or will not delivery a quality product or service. This exercise wastes the vendor's time and money and adds unnecessary and cumbersome administrative burdens to the frontline procurement professional. H.R. 1670 addresses this issue relative to large procurements whereas FASA identified those problem areas relative to small buys.

Treasury Initiatives to Encourage Competition with Small Business

To date, the Department of the Treasury is the only cabinet-level agency in the federal government that is consistently and conscientiously reaching out to the small business community relative to the award of federal contracts. CHART 1 shows that Treasury met its fiscal year 1994 goals to award contracts to small business concerns and exceeded its goals in three out of four categories. CHART 2 further demonstrates that, among those total dollars awarded to small businesses, IRS was the lead

bureau in the award of contracts to small business concerns.

CHART 1 TOTAL PROCUREMENTS: \$1.31B for FY94

FY1994	GOAL	PERFORMANCE	TOTAL AMOUNT
SBs	29.0%	42.4%	\$555,598,000
8(a)s	9.7%	14.8%	\$194,567,000
SDBs	2.0%	2.0%	\$ 25,637,000
Women	4.0%	4.9%	\$ 63,998,000

CHART 2 IRS Percentage of Total Treasury Dollars awarded to small business concerns

FY1994	PERFORMANCE	TOTAL AMOUNT
SBs	62.3%	\$346,324,255
8(a)s	58.0%	\$112,851,068
SDBs	55.2%	\$ 14,144,080
Women	44.4%	\$ 28,422,739

SBs - Small Business.

8(a)s - Section 8(a) of the Small Business Act. The Government's primary program to develop viable small businesses that are owned and controlled by members of socially and economically disadvantaged groups.

SDBs - Small disadvantaged business.

Women - Women-owned business.

In an attempt to promote competition and to award a respectable portion of procurement dollars to the small business community, Treasury, in conjunction with its prime contractors, established and now sponsors an annual procurement conference. Entitled, "PARTNERSHIPS", this conference invites small, minority, and women-owned business firms to discuss potential prime and subcontracting opportunities. Purchasing personnel

from each bureau in the Department and their selected prime contractor partners are on site to accept quotations for current requirements, and to identify potential candidates for future procurement opportunities. In the spirit of government reform, electronic data interchange and purchase cards transactions were awarded on the spot. All other awards were made within 10 working days after the conference.

As a demonstration of loyalty and commitment on the part of top management within the Department, "PARTNERSHIPS" 1994 was attended by former Secretary of the Treasury, Lloyd Bentsen, Dr. Steven Kelman, and Robert Welsh, Director of Procurement. The most recent conference, "PARTNERSHIPS" 1995, was attended by Secretary Robert Ruben, and bureaus successfully awarded several contracts that will enhance the survival of the small business community. CHART 3 summarizes those awards as follows:

CHART 3

BUREAU	TOTAL AWARDS	PERCENTAGE TOTAL
Customs	\$523,070	30.7%
Engraving/Printing	\$453,342	26.6%
IRS	\$142,252	8.3%
Mint	\$142,212	8.3%

Lastly, bureaus within the Department are individually reaching out to the community as well. IRS recently sponsored a two day 8(a) seminar whereby the procurement organization provided an overview, discussed its goals and objectives and long range procurement forecast opportunities. The Bureau of

Engraving and Printing conducts a quarterly small, minority, and women-owned business breakfast for a modest fee of \$10.00 whereby business opportunities are discussed indepth. The U.S. Customs Service videotapes the annual "PARTNERSHIPS" conference and holds a monthly "vendor outreach" whereby all Treasury bureaus participate to support the monthly event.

Again, Treasury has initiated several steps to promote competition amongst small businesses that other agencies should emulate.

The Role of the Contracting Officer:

Contracting officers are responsible for ensuring performance of all necessary actions for effective contracting, ensuring compliance with the terms of the contract, and safeguarding the interests of the United States in its contractual relationships.⁴ Moreover, the Contracting Officer is an agent for the government and is the only official that is granted the express authority to obligate funds on behalf of the government. To that end, the Contracting Officer must exercise a high degree of ethical behavior in the management of public funds.

What motivates and drives me as a Contracting Officer in this era of change, and what should motivate all Contracting Officers, is personal initiative, uncompromising professionalism, business acumen, and common sense. Team leadership is key as

⁴"Federal Acquisition Regulation", 1.602-2 Responsibilities.

well because we rely on input from a variety of stakeholders in the procurement process, to include the contract specialist, project/program manager, price and cost analyst, contracting officer's technical representative, legal counsel, quality assurance specialist, and industry and government management. As you can see, our role is no easy task, however, procurement reform lends the flexibility and affords the creativity that is needed for us to maximize our respective talents.

Conclusion

Chairwoman Meyers, Representative LaFalce, and members of the Committee, I will conclude my written statement by reiterating that, in my view, competition amongst small business will be enhanced, in lieu of stifled, due to four specific provisions that were included in FASA:

- Section 1091 - Contractor past performance will encourage businesses to perform in an outstanding manner and, should they perform well, incentivize them to compete for other government contracts;
- Section 4001 - Increased simplified acquisition threshold, from \$25,000 to \$100,000, means that there will be more contracts in which businesses can compete and possibly win and will encourage reluctant vendors to enter the government contracting arena because the procurement process has been streamlined and automated for procurements in that range;
- Section 5091 - Vendor excellence awards. Savvy entrepreneurs undoubtedly recognize the value and longterm

benefits of being selected as the premier contractor in the federal sector. In that regard, competition is maintained in the procurement process as vendors continually strive to obtain excellence and stand out from their peers; and

- Section 7104 - Small Business Procurement Advisory Council includes the Administrator of the SBA and the head of each Office of Small and Disadvantaged Business Utilization that has procurement powers. Top officials from these respective agencies will generate the attention to detail that is critical to the betterment of the federal procurement process relative to small business concerns.

This concludes my prepared remarks and I again thank you for the opportunity to express my views.

KEVIN W. JOHNSON

12307 Gable Lane
Fort Washington, Maryland 20744
(301) 292-4459

Career Objective: Senior Executive, Federal sector.

Background Summary: Eleven years progressive experience in the career field of Federal Government contract management. Responsible for pre-award (planning & acquisition) and post-award (management & administration) of Federal contracts for major weapon systems, Federal Information Processing (FIP) Resources, research studies, technical support services, construction, custodial services, shuttle services, spare parts, architect/engineer services, maintenance of FIP resources, video conferencing systems and advertisement services. Successfully managed fixed price, cost-type, indefinite delivery-indefinite quantity (IDIQ), labor hour and time & materials contracts with a systems life value between \$85K and \$1B.

Working Experience:

<p>May 1991- Present</p>	<p>Department of the Treasury, Internal Revenue Service, Washington, DC Contract Administrator & Contracting Officer, GS-13 Independently managed thirty fixed price and IDIQ contracts in support of the IRS \$23B <u>Tax Systems Modernization</u> strategy and negotiated over \$2M in savings. Recognized with three "Special Act" awards.</p>
<p>Jan 1990- May 1991</p>	<p>Administrative Office of the United States Courts, Washington, DC Contract Specialist, GS-12 and GS-13 Managed two fixed price maintenance contracts and served as Team Leader for the Cost Evaluation Team on the agency's only FIP resources acquisition; Cost savings were \$50M in favor of the Government.</p>
<p>May 1989- Jan 1990</p>	<p>Department of the Army, Information Systems Selection & Acquisition Agency, Alexandria, VA, Contract Specialist, GS-12 Negotiated and managed nine task orders under the \$4.5M <u>Army Operations Center</u> fixed price contract for the Pentagon's security system, resulting in a 20+ % savings in favor of the Government on each negotiated order.</p>
<p>Apr 1985- May 1989</p>	<p>Defense Logistics Agency, DCASPRO IBM Manassas, VA, Contract Management Specialist & Contract Administrator, GS-07 through GS-12 Managed twenty-five fixed price and cost-type contracts for major weapon systems and earned two "Superior Performance Awards".</p>
<p>Jul 1984- Mar 1985</p>	<p>Defense Logistics Agency, Defense Personnel Support Center, Philadelphia, PA, Acquisition Intern, GS-05 Satisfactorily completed 625 hours of classroom instruction in procurement.</p>

Education:

- 1983 Virginia Commonwealth University (VCU), Richmond, VA
Bachelor of Science, Business Administration and Management
 Concentration: Finance; Minor field of study: Economics
- 1995 1995 Executive Potential Program, Office of Personnel Management
 Candidate

Certifications:

- 1988 The George Washington University, Washington, DC
Master's Certification in Government Contracting
- 1994 National Contract Management Association, Vienna, VA
Certified Associate Contracts Manager (CACM)

Professional Affiliations:

- May 1985-
 present National Contract Management Association, NOVA Chapter
Special Topic Committees: Small Business & Team Leadership
- Nov 1991-
 present National Association of Black Procurement Professionals (NABPP),
Treasurer, Washington, DC Chapter (1995)
Assistant Editor, NABPP newsletter (1995)
- Oct 1994-
 present Association for the Improvement of Minorities, Internal Revenue Service,
 Washington, DC Chapter

Community/Volunteer Work:

- Oct 1991-
 present **Member**, Arlington Housing Corporation Affiliate Board of Directors.
Board President since October 1993.
- Sep 1994-
 present **Member**, VCU School of Business Alumni Board of Directors.
- 1995 - present **Contributing Writer**, VCU Office of Academic Support newsletter

Personal and professional references are available upon request.

REINVENTING ACQUISITION

Pledging Commitment to Procurement Reform

BY KEVIN W. JOHNSON, CACM

Editor's Note: The following represents the author's comments directed to Steven Kelman, administrator, Office of Federal Procurement Policy, after hearing Kelman's remarks as the general session speaker at the Sixth Annual National Association of Black Procurement Professionals Procurement Training and Education Conference, November 16, 1994.

In the spirit of promoting open communications among industry, government, staff employees, and management, and as you specifically requested during your opening remarks, I am pleased to briefly elaborate on how I can take, or have taken, personal responsibility to make the procurement process better where I work.

As a contracting officer currently working within the Communications and Support Administration Branch of the Office of Contract Administration, it is my responsibility to uphold the mission of the assistant commissioner (procurement) at the Internal Revenue Service (IRS) (Department of the Treasury). In that regard, using past performance as the key barometer, just before the expiration of the current contract and with the support of my immediate supervisor, I was able to successfully award a time and materials task order for both technical support services and the establishment of a "pilot" enterprisewide database for the IRS's three corporate computing centers to the incumbent contractor, a local 8(a) firm.

This task order continues to support the IRS's 10-year tax systems modernization strategy and, in addition to the usual evaluation/selection factors that are used for a procurement over \$100,000, much emphasis was afforded to the contractor's past performance over the last two-year period.

This example of flexibility that is afforded to contracting officers is consistent with your recently published remarks at the Industry Advisory Council round table discussion titled "Communication Exchange: Reinventing the Partnership," specifically when you responded to issue 1 "Is the current procurement system broken?" and issue 5 "Leadership is key." The bottom line objective, as you eloquently stated, is to improve communications between the above aforementioned parties and to bring past performance into the evaluation process. Moreover, your interview with *Contract Management* magazine (July 1994) reiterated the point that government contracts personnel must exercise the efficient management of public funds and serve the mission of their respective agencies if procurement reform is to succeed. To that end, I have felt encouraged to use good sense and good judgment in this environment of change.

Please be advised that I remain committed to and supportive of your initiatives to improve the federal acquisition process. In August 1994 I spoke with a member of your staff to volunteer my time to help rewrite Part 42, "Contract Administration," of the Federal Acquisition Regulation. I also volunteer to join the newly established nonsupervisory council that is targeted to meet with you periodically to discuss pertinent federal acquisition issues that you spoke of at the NABPP conference. □

ABOUT THE AUTHOR

Kevin W. Johnson is a contracting officer, Support Administration Section, Internal Revenue Service, Washington, D.C. He is a CACM and a member of the Nova Chapter.



EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

OFFICE OF FEDERAL
PROCUREMENT POLICY

NOT FOR RELEASE UNTIL
DELIVERY AUGUST 3, 1995

STATEMENT OF
STEVEN KELMAN
ADMINISTRATOR FOR FEDERAL PROCUREMENT POLICY
BEFORE THE
COMMITTEE ON SMALL BUSINESS
UNITED STATES HOUSE OF REPRESENTATIVES
AUGUST 3, 1995

Chairwoman Meyers, Representative LaFalce, and members of the Committee, I appreciate the opportunity to appear before you today to discuss the Administration's view on H. R. 1670, the Federal Acquisition Reform Act of 1995. Since the last time I appeared before this Committee, we have, together, made great strides in moving our federal procurement system in the direction of increased efficiency and greater flexibility to facilitate the selection of high-quality contractors offering good prices. Much of this progress can be attributed to the passage of the Federal Acquisition Streamlining Act (FASA), which your leadership and support helped to secure.

Thanks to FASA, agencies will be able to make small dollar purchases more rapidly and better emulate successful commercial practices. At the same time, small businesses will remain an integral source of supply for the government. An increase in the small business reservation along with the elimination of many of the clauses, terms and conditions that have made doing business with the government burdensome and undesirable will encourage more small businesses to explore federal contracting opportunities.

I think you would agree that FASA represents a "win-win" situation: it gives taxpayers much-needed streamlining and it promotes increased small business participation. While we should be proud of what we have accomplished, we must remember that the task of reform has not yet been completed, for FASA focuses mainly on smaller dollar purchases. To ensure that our system effectively provides increased value to taxpayers, we must also reform the way we make larger dollar buys.

Today, I would like to discuss with you how the Administration believes this much-needed reform can be achieved. As you will see, our strategy -- similar to that taken in the development of FASA -- seeks to accomplish meaningful reform in a manner that will serve the interests of all businesses -- both small and large. Before I describe how we would further reform the process, however, I would like to spend a few minutes explaining why change is so critical to this Administration and

what we believe is at stake if we simply stick with the traditional ways of conducting procurement business.

The Need for Change

When the President took office in January 1993, the Administration was confronted with a procurement system badly in need of repair. In comparison to the private sector, our system was far slower, much less effective in satisfying the needs of its customers, and less able to attract the best businesses (small or large). Consider the following:

- The Vice President's National Performance Review (NPR) found in one of the agencies it looked at that the process we use to buy information technology (IT) takes nearly four times as long as it does to make a comparable purchase in the private sector (49 months versus 13 months). To avoid the bureaucratic nightmare associated with conducting new procurements, agencies tend to make long-term "megasystem" buys rather than taking an incremental approach that would be more manageable, less risky, and cost less.
- In a survey I conducted while a professor at Harvard I found that 74 percent of private sector managers rated supplier performance on their most recent major contracts at an "8" or higher on a scale of 1 to 10, while only 48 percent of government managers felt the same.
- The NPR found that the average productivity per contract specialist has declined considerably between 1980 and 1992.

- A recent study by the General Accounting Office (GAO) reveals that between January 1990 and September 1992, nearly 45 percent of IT procurements of \$25 million or more were subjected to bid protests -- hardly the atmosphere in which to develop the kind of cooperative customer-supplier relationships that the private sector has found to be so important. As Philip Howard, author of the bestseller, The Death of Common Sense, put it recently in the Wall Street Journal, "Negotiations with vendors are hopelessly distorted . . . by the vendors' right to sue for any trumped-up unfairness in the process."

At first, it may seem odd that we have gotten to this state of disrepair. After all, who would have assumed that a system built around the sound principle of open competition could lead to the performance failures and bureaucratic inefficiencies that I have just described to you? A closer look reveals that the problem rests not with the principle of vigorous competition, but rather with the fear of discretion that we have adopted to manage this process. There is an extreme distrust towards our frontline contracting and program professionals, and a complete lack of faith in their ability to use common sense and good judgment to make sound business decisions in the best interests of the taxpayer. This flawed idea, which was once common in the attitudes of the owners of private businesses towards their employees, has long since been abandoned in the private sector, where companies have come to realize that the skills and

abilities of our workforce are this country's major competitive advantage in the world marketplace.

As a result of this fear of discretion, we have developed rigid rules and detailed prescriptions to manage the process. In my opinion, this fear of discretion can be directly linked to all the problems with the current system that I have just outlined.

We create endless trails of paper. We have developed a source selection process based on voluminous paper proposals and an overly formalized evaluation process, with seemingly endless documentation. The purpose of this paper blizzard is to prevent subjectivity from seeping into the process. This grinds our process virtually to a halt. Speaker Gingrich has noted this problem when he stated that:

The contract for the B-47 (which Boeing located and gave me) is about seventy pages. In contrast, the paperwork for the C-5a is so bulky it would take five C-5a's (our military's largest transport) to carry it.

In addition, evaluating pieces of paper is hardly a good way to choose companies to do work for us. An entire industry of professional proposal writers has developed to feed the government's paper-based process. They play no role in actually performing the work being bought -- they make money simply by churning out paper.

We develop overly detailed specifications. The distrust of contracting officials that is reflected in the complex and rigid rules that now govern how competitions are conducted has

ramifications that affect the acquisition process from the very beginning -- back to the point when the specifications and evaluation criteria are developed.

Many of you have read the stories of government salad dressing and chocolate chip cookies, where agencies have developed lengthy specs for common everyday products and where they pay much more than they would for a superior commercial product. These specifications arose in large part because of our unwillingness to let contracting officials choose from among readily available commercial products. So agencies developed detailed specifications and awarded contracts on the basis of the low bid. But, then agencies found that they left things out of the specs. So they added new bells and whistles making them even more detailed. And, even though the availability of suitable commercial products grew exponentially, it turned out that very few if any could meet all the features of the spec, so we ended up buying products specially manufactured for the government that cost more and were of lower quality.

We fail to consider a contractor's past performance in any meaningful way. While commercial firms have long relied on information about a contractor's past performance as a major part of the evaluation process, the government traditionally has attempted to select quality contractors almost exclusively by analyzing elaborate technical and management proposals, out of fear that consideration of past performance will result in contract award to cronies. In the course of my research while a

professor, I came upon a terrible situation where a supplier's excellent performance under the previous contract was ignored when the contract was recompeted on the grounds that the government should not "discriminate" in favor of a supplier simply because they had performed well! As a result, the recompeted contract ended up being awarded to a supplier who had written a good proposal -- and the new awardee proceeded to perform so poorly that the contract had to be terminated. The traditional refusal to use past performance in source selection defies common sense. More importantly, settling for inexpensive mediocrity hardly seems in the taxpayers' best interest if an agency determines that it can get better overall value by doing business with a higher priced supplier with an excellent track record.

We demand process perfection. On top of this rigid structure, we have placed a protest system which demands -- at least in the IT world -- not simply that judgments be rational, but rather that the process be near perfect. This has served to distract contracting officers from focusing on their primary mission of obtaining good products and services and caused them to worry instead about ever greater formal documentation to prove that their decisions were near perfect.

In short, we have produced -- all in the name of "competition" -- a system that bears virtually no resemblance to the competition that has made our commercial marketplace the envy

of the world. On behalf of the taxpayer, I ask you, Madame Chairwoman, is this really the best we can do?

The Steps Taken by the Administration

I am proud to say that this Administration, thanks in large part to the efforts of the NPR and the dedication of our career contracting workforce, has accepted the difficult challenge of changing tradition where it is not working. In his first year in Office, the President made clear that a bureaucratic procurement system would no longer be acceptable. And I quote:

We must move to achieve real savings through procurement reform. While the private sector is becoming more flexible, more innovative, government has become in many ways over the past 10 years even more bureaucratic. At a time when all businesses are looking for better suppliers and lower prices, the Government is too often losing suppliers and paying higher prices by putting up so many hurdles and costly requirements in our procurement system.

With the endorsement of the NPR, agencies have become actively engaged in learning how to manage risk. Here are just two of many examples of what the Administration is doing to make common sense an integral part of our procurement process:

- *We are increasing the use of past performance.* It is well known that I have been on a crusade of sorts during my tenure as Administrator to encourage agencies to make a contractor's past performance an essential consideration in the contract award

decision. Shortly after coming to OFPP, I initiated a pledge program to increase agency usage of this fundamental commercial concept. While perhaps a bit corny, this program has been my way of telling agencies that it's okay to exercise discretion in the name of securing for the taxpayer the high level of quality that users in the commercial world have come to expect from their suppliers. I am pleased to say that the message is being heard and our taxpayers are benefitting from it. Since moving to a best value approach in source selection that gives significant consideration to past performance, the Bureau of Prisons noted that service quality has dramatically improved on its contracts for half-way house management, and the Defense Personnel Supply Center in Philadelphia reported that the dollar value of contracts terminated for default has declined from \$133 million a year to just \$13 million.

- *We are making proposals less paper intensive.* We are working to reduce the paper blizzard and make the source selection process rely more on good judgment. For instance, Hanscom Air Force Base uses "in-plant reviews" to replace the traditional paper management proposals. Hanscom has been very pleased with the results. They cite as an example a proposal for software development received from a small business with whose work they were not familiar. Given the importance of the software for national security, they were hesitant about making the award based on a piece of paper. But based on the in-plant review, they were able to see that the business had the skills and

commitment necessary to do the work. They awarded the contract to this small business, which has successfully completed the project, within budget and ahead of schedule.

Next Steps

Madame Chairwoman, I hope that this brief discussion has given you a better understanding of why the Administration is working so hard to put our procurement system in a better position to reap the efficiencies of vigorous competition without the associated burden of bureaucracy and to ensure integrity in our process without allowing an onslaught of disruptive and costly protests. As I have told your colleagues on the Committees for Government Reform and Oversight and National Security, the Administration's byword is: "competition yes, bureaucracy no."

True to our word, Madame Chairwoman, the Administration stands firm in its commitment to preserving the open access that has become a hallmark of our modern day system. The reason is simple: the vigorous competition that comes with giving all responsible sources the initial opportunity to participate can translate into lower costs and greater innovation. Our reform efforts allow contracting officers easily and effectively to distinguish from among the many sources that express an initial interest, those that stand the most likely chance of receiving an award. As I have just explained, history tells us that if both of these elements -- openness and streamlining -- are not

solidly implanted in our system, the benefits of lower costs and greater innovation will never be realized.

The Competition in Contracting Act did much to instill the concept of openness in our process and to reduce the number of sole source contract awards. However, it did little to provide agencies with the tools to take advantage of this openness in an efficient manner, as well as in a way that allows contracting officials to use common sense and good business judgment. For this reason, I believe the actions taken by the Government Reform and Oversight Committee in its markup of H.R. 1670 are a good step in this direction. While the bill preserves full and open competition, it recognizes that it must be pursued in a manner that is consistent with the need to fulfill the government's requirements efficiently, and to permit the exercise of good business judgment by our contracting officials.

Let me take a moment to describe how this type of authority could be effectively used -- to the benefit of contractors (of all sizes) and the government alike.

Making Downselect Decisions More Effective through a "Two Phase" Selection Process

In a typical procurement, many of those sources that express an initial interest will ultimately not be competitive. Unfortunately, our traditional approach to procurement fails to address this issue adequately. As a result, sources can find themselves devoting significant time and money to compete for work they are unlikely to get. This can be particularly

detrimental to small businesses. Not surprisingly, industry has commented that they would like to know earlier in the competition if they do not have a likely chance for award. At the same time, agencies can find themselves having to expend resources they can ill afford to waste evaluating offers that are unlikely to be selected.

One way to avoid this inefficiency is to initiate a competition with a streamlined process where sources submit basic information as requested by the contracting officer and permit a limited number of sources to be selected to participate in a further competition that would involve the submission of formal offers. As we envision it, sources in the "initial" phase of competition would be just that: "sources" -- as opposed to offerors. They would have a full opportunity to compete, but would focus on how their capabilities would fit with what the government is generally looking for, rather than going through the time and expense of thinking up a detailed solution to meet the government's needs. This would save participants the cost and burden of preparing detailed proposals, which would be better used developing other market opportunities. It would also save the government the time spent evaluating them, whenever a simpler submission could effectively enable the government to identify those sources that are likely to submit the most competitive offers. The more formal competition would be left to the second phase so that only those that are likely to be competitive will incur the expense of submitting additional materials.

Quality Based Procurements

H.R. 1670 would authorize an agency to establish from an initial selection a verified list of vendors who would compete for repetitive procurements within the general scope of the initial competition. We support the concept of evaluating contractors' business practices, product or service quality, and past performance and "verifying" such firms to become eligible to compete in competition with other "verified" firms. This proposal is a unique and innovative way of maintaining a base of qualified contractors to meet the government's needs while retaining the incentives created by competition. Provided lists were opened to add or substitute sources, this authority would enable agencies to utilize much more effectively the competitive process while providing ongoing opportunities for new firms, including small businesses, to apply for this program.

With respect to considering past performance in the qualification process, recent changes to the Federal Acquisition Regulation now require agencies to prepare evaluations of contractor performance. It would defy common sense not to allow the government to use past performance information. What would you think if some law prevented you from continuing to do business with a company that had treated you well in the past? This will provide agencies with an easy and credible source for evaluating a contractor's past performance. To ensure that source selection officials are seeing a full picture, the FAR requires that performance assessments be shared with contractors,

that contractors be given a chance to respond, that review be provided at a higher level within the contracting activity if requested and that all information be part of the file. In a best practices guide recently issued by my office, we encourage agencies when conducting reference checks to gather information from the widest number of sources available (to help ensure that it does not reflect personal bias) -- including commercial sources for businesses seeking to enter the government marketplace for the first time -- and to elicit information from references as to why they think a contractor's performance was good or poor as it relates to the key performance requirements of the contract.

Using Simplified Means to Buy Commercial Items

H.R. 1670 would further permit full and open competition to be used more efficiently by permitting commercial item buys to be made using simplified means. While there is apparently some confusion on this point, the authority to use simplified procedures would not relieve a contracting officer from seeking competition through the publication of notice. The FAR makes clear that a contracting officer must provide widespread public notice for contract actions above \$25,000. However, we do seek to eliminate the paperwork blizzard once interested sources have identified themselves. Among other things, simplified procedures would take away the requirements for formal evaluation plans and scoring of quotes, and permit simplified documentation practices.

While development of detailed specifications and formal evaluations may be needed under certain circumstances, and can be provided for in the FAR under the language in H.R. 1670, they are largely unnecessary in commercial item buys in any amount. The rigors of the commercial market already help to ensure that vendors offer proven products. In many cases, a consideration of price in combination with an evaluation of the vendor's and the product's past performance is all that is really necessary to make a best value determination. Permitting the use of streamlined procedures will save agencies the time and expense of designing detailed evaluation schemes to analyze lengthy proposals, and it will save vendors the cost of describing in a detailed proposal what can be effectively communicated through customary commercial marketing tools. These are burdensome steps, unheard of in the commercial world, that delay the acquisition process, interfere with good business judgments, and add little to no value. Equally important, these changes will encourage new commercial firms, both small and large -- many of whom currently refuse to do business with the government -- to seek government contracts.

Reforming Bid Protests

Before concluding, Madame Chairwoman, I would like to take a moment to speak to the bid protest provisions of H.R. 1670. I believe H.R. 1670 needs to take further steps to curb the excessive litigation that is plaguing our system -- especially on

IT procurements at the General Services Administration Board of Contract Appeals (GSBCA). Unless we stop allowing our customers to manage us by litigation, no reform -- no matter how promising or empowering its design -- will achieve the streamlining we need.

While Congress obviously hoped that the increased scrutiny of the GSBCA process would improve the quality of the IT contracting process, it is instead creating side effects that agencies cannot afford and taxpayers should not have to bear. Specifically, such scrutiny is discouraging innovation by increasing fear of discretion-aversion and expanding bureaucracy. In addition, it is creating an unproductive atmosphere of animosity and forcing agency programs to absorb added disruptions and costs. And, despite these high costs, IT procurements are largely viewed as being perhaps the most troubled area of government contracting. Let me take a moment to remind you of just how high a price the taxpayer is paying for this excessive litigation.

Disruption Caused by the Current Process

The very nature of the so-called "de novo" review process used by the GSBCA lends itself to second-guessing and a degree of examination well beyond what is needed to determine whether an agency's actions were reasonable. This occurs because de novo review permits the GSBCA essentially to redo the procurement process based on its own analysis of the agency's actions.

While even the GSBICA itself will admit that an agency -- not an outside adjudicatory body -- is in a better position to determine how to meet its mission, de novo review permits the board to substitute its judgment for that of the agency by sanctioning it to rework the entire evaluation process. To undertake such a review simply to determine if a contracting officer decision was reasonable is wasteful, intrusive, and invites precisely the type of inappropriate second-guessing that discourages innovative and creative thinking.

Increased Cost Caused by the Current Process

Agencies find themselves having to expend considerable resources to defend a GSBICA protest. A report on computer chaos by Senator Cohen indicated, for example, that the Army pays almost ten times the cost to defend a protest at the GSBICA than for a protest lodged with the GAO. This is probably due, in large part, to parties having to engage routinely in extensive and costly discovery at the GSBICA to create hastily a voluminous record upon which the board can make an independent assessment. The cost of such discovery can also place a heavy burden on vendors -- especially small businesses.

In addition to resource costs, there is the monetary cost of delay in implementation of the contract -- which can be significant if the agency is forced to sign an extension with an incumbent at a cost considerably higher than that which would have been paid if a contract was entered into with the awardee.

What We Must Do

The markup by the Committee on Government Reform and Oversight removes some of the most objectionable features of the bill as originally introduced, and is a step in the direction of removing some of the disruption and cost from the current IT protest process. However, we believe further steps must be taken if we are to achieve meaningful protest reform. We must ensure that the protest function for all procurements is returned to its proper role of ensuring simply that goods and services are being acquired in a rational manner.

Approximately 15 information technology companies have recently expressed their support to me for aggressive congressional action to curb the burdens and adversarial environment created by the present process. These organizations understand that our objective must be to ensure rational judgment -- not process perfection. They appreciate that redress for incidents of arbitrary and capricious decision-making and other violations of procurement law that would cause material prejudice can be provided in a manner that is relatively inexpensive for both parties and non-intrusive to the agency. Finally, and, perhaps most importantly, these organizations recognize that the time for bold Congressional action is now, as agency budgets and workforces continue to diminish. I urge you to join with them and the Administration in going further to secure genuine reform.

Conclusion

Chairwoman Meyers, Representative LaFalce, and members of the Committee, as you can clearly see, the Administration is deeply committed to bringing about genuine and meaningful change -- change that will benefit both small and large contractors. Your support has enabled us to improve our small dollar buying practices. In the spirit of bipartisanship, I ask again for your support to continue the important reform effort begun by FASA.

H.R. 1670, with its recognition that full and open competition must be pursued in a manner that is consistent with the goal of efficiently, can be a vehicle for achieving significant procurement reform this year. For the taxpayer's sake, I hope you will join us as we work towards what I believe can be historic reform.

This concludes my prepared remarks. I will be happy to answer any questions you may have.

STATEMENT

of

**E. Colette Nelson
Chair, Procurement Committee
Small Business Legislative Council**

on behalf of the

**SMALL BUSINESS WORKING GROUP
on PROCUREMENT REFORM**

before the

**Committee on Small Business
U.S. House of Representatives**

August 3, 1995

**Statement of
Small Business Working Group on Procurement Reform
on
"Small Business Participation in Federal Contracting:
Assessing H.R. 1670, the 'Federal Acquisition Reform Act of 1995'"**

My name is Colette Nelson. I am Executive Vice President of the American Subcontractors Association and chair of the Procurement Committee of the Small Business Legislative Council. Today, I am appearing as chair of the Small Business Working Group on Procurement Reform, an informal coalition of associations that serve as advocates for small businesses, including small businesses owned by minorities and women. The list of associations that participate in the Small Business Working Group is attached to my testimony.

The Small Business Working Group was formed during the consideration of the legislation that became the "Federal Acquisition Streamlining Act of 1994" (FASA), Public Law 103-355. Our group's basic objective was to see that the practical business needs of small government contractors were recognized. Procurement simplification and streamlining should not be exclusively for the benefit of Government buyers. Procurement reform legislation should not be the source of new barriers to small business participation, both at the prime contract and subcontract level. Unfortunately, such legislation

can be the source of new obstacles, especially when Congress grants excessively broad discretion to the regulation writers.

The Small Business Working Group has tried to monitor FASA's implementation. Given the volume of regulatory changes, it has not been an easy task. Despite assertions to the contrary, FASA made the most sweeping changes to the Federal procurement process since the landmark Competition in Contracting Act of 1984. We commend the Committee for undertaking oversight of FASA's implementation. It is sorely needed.

Despite being in the midst of FASA's implementation, we are now confronted with a new proposal to "fundamentally" change the Federal procurement process, H.R. 1679, the "Federal Acquisition Reform Act of 1995". As you know, the small business community was deeply concerned with many of the provisions of this bill, which was the subject of a hearing before this Committee on June 29th.

On July 27th, the Committee on Government Reform and Oversight reported H.R. 1679. We thank you for calling today's hearing to obtain a broad array of assessments of the reported bill's likely impact on federal contracting, and especially the participation of small firms.

In its present form, the bill would be a source of new obstacles to small business participation in Federal contracting, and should not be enacted. Since it appears likely that the sponsors of the H.R. 1670 intend to seek action by the full House early in September, we would urge you to offer amendments similar to those adopted on the version of H.R. 1670, which was attached to the National Defense Authorization Act for Fiscal Year 1996, H.R. 1530.

Our analysis of the provisions of the reported bill follows.

Title I - Competition

"Full and Open Competition"

Section 101 (Improvement of Competition Requirements) of the reported bill would fundamentally change the standard and practice of "full and open competition" established by the landmark Competition in Contracting Act of 1984 (CICA). The provision makes parallel amendments to section 2304 of title 10, which governs defense procurements, and to Section 303 of the Federal Property and Administrative Services Act of 1949 (Title 41), which governs the civilian agencies.

The proponents of H.R. 1670 assert that it maintains "full and

open competition". We would urge that the reported bill only maintains the use of the phrase "full and open competition", while completely eliminating the current standard and practice. We believe that a simple comparison between the competitive practices imposed by CICA and those proposed by H.R. 1670 will support this position.

Statutory Exceptions to Competition Eliminated

CICA requires contracting agencies to use competitive procedures unless the use of "other than competitive procedures" can be justified against one of seven statutory exceptions. These seven exceptions recognize an array of circumstances in which obtaining competition is not possible. For example, the clearest situation is one in which there is only one source capable of meeting the Government's needs. Another statutorily recognized situation in which competition requirements may legitimately be restricted is that in which disclosing the Government's needs to other than a limited number of sources would compromise national security. CICA's statutory exceptions to competition are standards that have proven themselves for a decade, simultaneously meeting the legitimate needs of the procuring agencies and acting as a necessary deterrent to non-competitive contracting.

"Justifications and Approvals"

CICA requires that the use of other than competitive procedures must be justified and establishes clear requirements for the approval of such noncompetitive contract awards. Level of approval is geared to the dollar value of the contract proposed for award on a non-competitive basis. Based upon a decade of experience, Congress has periodically adjusted the level of the approval to minimize delay, but still maintain accountability. CICA also specifies minimum standards for the documentation needed to support a contracting officer's decision to use of other than competitive procedures. Again, a decade of experience has proven that the current statutory requirements regarding such Justifications and Approvals (J&As) are effective in deterring unwarranted sole-source contract awards.

Limitless Discretion for Non-competitive Contracting

In contrast to CICA's seven statutory exceptions authorizing the use of other than competitive procedures, H.R. 1678 would authorize the use of other than competitive procedures under two new and essentially unlimited exceptions to competition. Under H.R. 1678's proposed standard, the use of competitive procedures could be avoided if the buying activity determined that the use of competitive

procedures is not “feasible” or “appropriate.” H.R. 1670 provides no statutory standard regarding either new exception. It merely directs that the use of these new exceptions shall be specified in the Government-wide Federal Acquisition Regulation (FAR). Essentially, this provision of H.R. 1670 grants a statutory “blank check” to the regulation writers to authorize non-competitive contract awards. In our opinion, enactment of this provision would set-back the procurement process to the predominantly non-competitive environment of the 1970s that prompted Congress to enact CICA.

H.R. 1670 would also convert CICA’s seven statutory exceptions to competition to illustrative situations to be included in the FAR coverage relating to the use of other than competitive procedures. It is important to note that H.R. 1670 makes explicit that the regulation writers are free to add other exceptions to the seven drawn from current statutory exceptions to competition.

Statutory “Justification and Approval” Process Repealed

H.R. 1670 would also eliminate the current statutory system for justifications and approvals (J&As), previously described, and substitute a requirement for the regulation writers to develop appropriate FAR coverage relating to the same subject. Again, no

statutory standards are provided. Essentially, the regulation writers are granted another “blank check”.

We believe that the current statutory standards for the current J&A process have worked well, and should not be repealed. They require the conduct of a business-like decisional process and assure that essential elements of information are available upon which to judge the appropriateness of the contracting officer's decision to award a contract using other than competitive procedures.

Additional Qualifier on Competitive Contracting

H.R. 1670 further conditions CICA's unequivocal statutory preference for competition in contracting by saying that the use competitive procedures must be “consistent with the need to efficiently fulfill the government's requirements”. It is our view that the Government's description of its need, the supplies or services intended to be purchased, is what should be “consistent with the need to efficiently fulfill the Government's requirements”. Having defined how to most efficiently meet the Government's need, then competitive procedures should be required, as they are today, for making the necessary purchase.

Simply put, we believe that "full and open competition" should continue to be the Congressionally-recognized norm for Government contracting. It cannot, if the existing standards and procedures enforcing adherence to that norm, are repealed.

Definitional Changes - "Open Access"

Section 103 of the bill alters key definitions relating to the "full and open competition" standard, that are found within the Office of Federal Procurement Policy (OFPP) Act.

First, H.R. 1670 establishes a new term "open access". It is our understanding that the sponsors have included this new term to demonstrate their intent that the bill's new standard for competition emphasizes the openness that is a core objective of CICA's "full and open competition" standard. The bill's definition of "open access" is the current definition for "full and open competition" -- that is, "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement". This definitional change has left the term "full and open competition" undefined, although H.R. 1670 continues to make use of the term. When analyzed in the context of the drastic changes to the current practice of "full and open competition", previously described, we believe that the

definitional changes will only make it more likely that the regulation writers will take this opportunity to erect insurmountable barriers to participation of small firms in the Federal procurement process.

Definitional Changes - "Competitive Procedures"

H.R. 1670 also makes very significant changes to the current definition of "competitive procedures." Under current law, "competitive procedures" means "procedures under which an agency enters into a contract pursuant to full and open competition". Under H.R. 1670, "competitive procedures" means "procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the government's requirements".

As was previously noted, "full and open competition" would become an undefined term under H.R. 1670. Further, the proposed definitional change to "competitive procedures" strongly suggests the extent of competition may be restricted to be "consistent with the need to fulfill the government's requirements". Proponents of the change emphasize that the competitive procedures must provide for "open access", that is, "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement".

Given the statutory words, both interpretations seem to have merit. The final decisions regarding the operative meaning of “competitive procedures” are left to the career regulation writers drafting the implementing FAR coverage. In our opinion, yet another “blank check”.

Increased Threshold for “Posting” of Contract Opportunities

Small business concerns must have timely access to adequate information about Federal contracting opportunities, if CICA’s competition requirements are to have any meaning in practical terms. Contracting opportunities below the small purchase threshold have always presented a challenge to small firms. Contracting opportunities below the small purchase threshold are exempt from the requirements of the Small Business Act (and the DFPP Act) which specify that such opportunities be announced in the *Commerce Business Daily* 15 days prior to the release of the solicitation, and that the solicitation provide each prospective offeror 30 days to fashion and submit its offer in response to the solicitation (45 days in the case of a contracting opportunity for research and development, which usually require the preparation of more complex proposals).

When CICA was enacted in 1984, the small purchase threshold was \$10,000. In 1986, the small purchase threshold was increased to \$25,000. At the same time, the Congress required ten-days of "posting" by the local contracting office to provide to the small business community some visibility of higher dollar value "small purchases". Specifically, posting is required for contracting opportunities greater than \$5,000 but less than \$25,000 if offered by the Department of Defense, and greater than \$10,000 but less than \$10,000 if offered by a civilian agency. These specific posting thresholds were adopted because they were already applicable to DOD and the civilian agencies in 1986 by FAR coverage. When FASA was enacted, the small business community fully anticipated that announcement of these contracting opportunities through such local posting would be replaced by electronic solicitation and award through FACNET (Federal Acquisition Computer Network).

H.R. 1670 adopts an Administration proposal to establish a "uniform" posting threshold, at \$10,000, below which a contracting office would no longer have announce contracting opportunities through local posting for at least a 10-day period. Obviously, this would deny small firms access to the thousands upon thousands of

contracting opportunities offered by DOD with an anticipated award value of between \$5,000 and \$10,000. Those contracting opportunities would simply become invisible. Their exclusion from the posting requirement would also remove a principal incentive for announcing these contract opportunities in the future through FACNET. They would now be subject to the preferred method of solicitation (according to the FAR coverage), telephonic solicitation.

If the posting threshold is to be altered and made uniform, we would urge that it be established at \$5,000. This would force the civilian agencies to provide small firms with knowledge of more of their contracting opportunities. It would also have the salutary affect of encouraging more effective implementation of FACNET. However, as suggested in the GAO testimony during the Committee's July 20th hearing on the implementation of FASA, full implementation of FACNET may be in jeopardy for the near term.

No Case Has Been Made to Abandon the Standard and Practice of "Full and Open Competition"

We believe that no case has been made for changing the standard and practice of "full and open competition". No study of which we are aware has recommended such a change. In fact, the

Advisory Panel on Streamlining and Codifying Acquisition Laws, the so-called Section 800 Panel, composed of recognized contracting experts from both Government and the private sector, specifically reviewed the issue of changing the existing competition standards and rejected making a recommendation for any such change.

As you will recall, the Section 800 Panel's 1800-page report provided the analysis underpinning the legislation that ultimately became the Federal Acquisition Streamlining Act of 1994.

Unfortunately, such an analytical effort does not appear to be available to support many of the provisions of H.R. 1670, particularly the provisions of Title I.

Further, to our knowledge, there has been no testimony recommending changes to the "full and open competition" standard, before any committee during this Congress or the previous Congress. In large measure, H.R. 1670's proposal to eliminate the standard and practice of "full and open competition" was totally unexpected. Such a change is simply not necessary to address the problems frequently cited as the basis for H.R. 1670's fundamental changes to existing contract competition practices.

The Problems Cited Don't Substantiate the Changes Being Proposed

During the hearing before the Committee on Government Reform and Oversight on May 25, there was frequent mention of the practical objectives being sought from the enactment of H.R. 1670. One of the sponsors' objectives was to try to create an environment that would avoid having firms enter contract competitions which they have no realistic chance of winning. The other frequently cited objective was to determine earlier in the evaluation process that a firm's proposal simply is not the proposal that will be tapped as the winner.

These stated objectives are worthwhile because small firms, in particular, have no desire to expend scarce bid and proposal funds on government contract competitions that they believe are not likely to result in a contract award.

Small firms will make the business decision not to participate if they have adequate information to do so. Giving contracting officers broad authority to exclude firms which they believe would be non-competitive is the wrong answer. The authority to exclude a firm from participating in a competition must only be permitted when a buying activity has demonstrated such a limitation on full and open

competition is needed and then accomplished through pre-qualification procedures that are open and fair.

During the hearing, there was also frequent discussion of the how beneficial it would be to Government and contractors if contracting officers were able to earlier exclude from further consideration those proposals that have no realistic chance of being awarded the contract.

We agree. A small firm is interested in learning sooner rather than later that its proposal will not result in a contract award, when fairly measured against the proposals submitted by its competitors. Again, this will conserve limited resources available to such firms for marketing other contracting opportunities that have a higher probability of resulting in a contract award.

H.R. 1670 Offers the Wrong Solutions

Unfortunately, these laudable objectives became the basis for H.R. 1670's proposal to abandon the standard and practice of "full and open competition" and, as we shall describe later in this testimony, the equally unacceptable proposal to empower contracting officers to restrict firms from entering a competition.

The proponents of these provisions of H.R. 1670 say that we can

no longer afford to have “competition for competition’s sake”. To our understanding, this was never an objective of the Competition in Contracting Act of 1984, given the workable array of statutory exceptions included along with the “full and open competition” standard. Similarly, we don’t believe that it has been demonstrated as the prevailing practice during the ten years that CICA has served as the foundation for the federal procurement process.

Excessive Competition Is Not a Real Problem, but Sole-source Contracting Is

Excessive competition has never been factually demonstrated as a systemic problem with the procurement process. In sharp contrast, the GAO and IG reports identifying examples of the persistent problem of unjustified sole-source contracting, and the associated increased Government costs, would probably fill several bookshelves.

Alternative Solution - Better Description of What the Government Want to Buy

H.R. 1678 seeks to attain an agreed upon objective by flawed means. We believe that small firms will unilaterally avoid unwinnable contract completions, if they have adequate information to make an informed business decision. To provide access to such decisional information, the Federal buying activities need to expand their

current practices of describing with more precision what product or service the agency is seeking to procure. The greater the exactitude and certitude with which the agency defines the subject matter of the contract to be awarded, the more likely it is that the pool of potential competitors will make an informed judgment on whether to participate.

Alternative Solution - Clearly Statement of Evaluation Factors

Second, we have long advocated that government contract solicitations should contain a fuller description of the evaluation factors to be used in selecting a winner. Progress has been very recently made with regard to this objective, particularly with respect to more solicitations more clearly expressing the importance of and relationships between the various evaluation factors specified. FASA made further improvements in this regard, which we hope will be fully implemented in practice.

Alternative Solution - Access to Information about Other Prospective Competitors

The third improvement that can be made to help firms make more informed judgments about entering competitions is to provide information about the identity of the other potential competitors.

By knowing which other firms may have requested a copy of the solicitation, a firm is in a better position to judge its relative position in the subsequent competition, further helping the firm to make a more informed business judgment to submit a proposal.

Currently, agencies deny firms access to information concerning other prospective offerors. In the implementation of the so-called 1986 Procurement Integrity Act, release of such information has been deemed to be prohibited.

It has always seemed improbable that having knowledge of the mere identity other potential offerors (in contrast to their proposals) could prejudice the conduct of the competition among those firms that ultimately chose to submit a proposal. One of the positive features of H.R. 1670, contained in Title III, are proposed amendments to the Procurement Integrity provision of the OFPP Act. Among other things, they would refocus the statutes implementation on abuses more directly impacting the fair conduct of federal procurements.

Rather than empowering contracting officers to exclude prospective competitors, we would urge providing them access to the information needed to make more informed business decisions to enter Federal contract competitions.

Alternative Solutions – Explicit Authority for Contracting Officers to Make Early “Cuts” in the Competition

For example, we believe current law already permits contracting officers to establish what might be described as an “initial competitive range” based upon an evaluation of the offers submitted. Only those falling within this competitive range would be permitted to continue further in the competition. Since contracting officers maintain that they are unwilling to undertake such action for fear of bid protests, we would suggest that the authority to establish such preliminary “cuts” could be made more explicit by the legislation, thus providing greater “cover” to contracting officers.

Debriefings Are An Essential Element of the Process

In screening-out unsuccessful proposals earlier in the evaluation process, it is important that a firm be accorded a right to a debriefing. Such debriefings help the firm to better understand the reasons why its proposal was deemed unlikely to result in a contract award, avoiding bid protests. Debriefing also enables the firm to identify its weaknesses, potentially making the firm a better competitor in subsequent competitions.

It should be noted that unsuccessful competitors were only recently accorded a right a debriefing with the 1994 enactment of FASA. It is one of the most notable examples of the improvements made by FASA to the competition process for contracts above the Simplified Acquisition Threshold.

Section 104 of H.R. 1670 continues the theme of according debriefings to those excluded from a competition prior to award, but unfortunately accords excessive discretion to a contracting officer to deny a request for a debriefing. It is unfortunate that the bill's provision falls short of according a clear right to an offeror excluded from a competition.

Title I -- Other Provisions

Elimination of Fee Limitations

Section 105 of H.R. 1670 amends both Section 2306 of Title 10 and the corresponding provision of the Federal Property and Administrative Services Act of 1949 (Section 304) to eliminate a series of statutory eliminations on the amount of fee that can be paid to a contractor under various types of service contracts.

Currently, a contractor performing a cost-plus-fixed fee contract for experimental, developmental, or research work may not be paid a fee that represents more than 15 percent of the estimated cost of the contract. The fee for performing a cost-plus-fixed fee contract for architectural or engineering services may not exceed 6 percent of the estimated cost of the project. The fee for performing any other type of cost-plus-fixed fee contract is limited to 10 percent of the estimated cost of the contract.

The elimination of these statutory fee limitations, especially that related to architectural-engineering services, has long been sought by associations representing the design and engineering professions.

Contractor Verification System - Excessive Discretion for Excluding Small Contractors

Section 106 (Contractor Performance) of H.R. 1670 would add a new section 35 to the Office of Federal Procurement Policy Act, establishing a new contractor prequalification system. It would also repeal the existing contractor prequalification systems found in section 2319 of Title 10 and the parallel provisions in section 303C of Title 41.

The current contractor prequalification provisions were enacted during the mid-1980s as part of the Congressional responses to the spare parts horror stories at DoD and elsewhere in Government. They were included to prevent the arbitrary exclusion of small manufacturers that were seeking to compete for spare parts contracts that had previously been procured exclusively on a sole-source basis. These provisions allow buying activities to establish "Qualified Bidders List," "Qualified Manufacturers Lists," and similar lists of prequalified offerors when they are needed. To prevent abuse, the statutes set out clear standards. First, agencies are required to demonstrate the need for establishing such a restriction on full and open competition. Second, these statutes require that the agencies clearly state the qualifications standards that a firm must meet. Third, these statutes make explicit that any firm must be given the opportunity to demonstrate its ability to meet the qualification standards. Fourth, these qualification standards focus on measuring the objective technical capabilities of a firm to do the work required by the agency establishing the prequalification requirement.

In contrast, the contractor verification system established by H.R. 1670 lacks many of these statutory safeguards. Rather, it

accords to the regulation writers broad discretion on when contracting officers may limit competitions to such "verified" contractors. The provision also grants broad discretion to the regulation writers regarding the termination of a contractor's status as a verified contractor. As currently written, the provision only assures that "a contractor whose verification is terminated or revoked will have a fair opportunity to be considered for reentry into the verification system."

No Case Made That Existing Prequalification Procedures Have Not Worked

Again, we assert that no case has been made that the current systems for contractor prequalification have not been meeting the needs of the procurement agencies, while providing appropriate protections to contractors, especially small contractors, from arbitrary treatment by contracting officers. In questioning the workability of the new proposed Contractor Verification System, we would particularly cite its reliance upon being able to obtain timely, accurate, and complete data concerning a firm's past performance. Although FASA calls for the establishment of systems for the collection of past performance data and its use in evaluating

contractors for the award of individual contracts, these systems are still under development and have not been tested in practice. The pilot programs of various Federal agencies that have sought to use past performance as an evaluation factor in the award of contracts have thus far been fairly limited and agency specific in measuring past performance. These pilot programs have generally lacked an effective means of measuring a firm's past performance outside of the federal government arena and especially its performance in the private commercial marketplace. This represents a particularly serious deficiency since one of the basic objectives of FASA was to bring more commercial firms into the government marketplace. It seems to us to be wholly inappropriate, given the status of implementation of the FASA provisions, to be actively considering a further expansion of the use of past performance in the federal procurement process. Denying a firm the opportunity to compete on the basis of a past performance evaluation, as proposed in H.R. 1670's Contractor Verification System, is unacceptable until there has been successful experience with systems that accurately collect, verify, and disseminate past performance data. One need only look at the difficulties afflicting the collection and reporting individual credit

information to understand the significant challenges which will face government managers as they seek to use past performance data in a manner that assures fairness and accuracy.

Title II - Commercial Items

Title II of H.R. 1670 contains four sections which the authors believe are necessary to facilitate the acquisition of commercial items on a broader scale by the federal government. These provisions make a series of amendments to provisions adopted only last year in FASA . As we have noted earlier, the regulations implementing FASA have not yet been finalized or put into practice.

Using Simplified Procedures to Purchase "Commercial Products", without dollar limitation.

Section 202 of the bill would specifically authorize the use of simplified procedures for the acquisition of commercial items without any dollar limitation. We believe that this authority is completely unacceptable.

The simplified procedures set forth in the Federal Acquisition Regulation were first adopted when the Small Purchase Threshold was \$10,000. FASA increased the Small Purchase Threshold to \$100,000, and redesignated it as the Simplified Acquisition Threshold (SAT).

However, the regulations implementing the new SAT left the existing FAR coverage essentially unchanged. Further, FAR's definition of commercial item is exceedingly broad, permitting the recognition of an item as a "commercial item" even though it has not as yet been sold in the commercial marketplace. In fact, an item which an offeror merely intends to offer for sale in the commercial marketplace meets FAR's definition of a commercial item. Procurements of commercial items in excess of the \$100,000 SAT should be subject to the full and the full and open competition standard required of any other procurement exceeding the SAT.

Title III - Additional Procurement Reforms

Reliance on the Private Sector

Title III of H.R. 1670 includes an array of provisions touching upon matters affecting the conduct of the procurement process. Section 301 (Government reliance on the private sector) establishes an important statutory statement of congressional policy long sought by the small business community. The Small Business Working Group strongly supports this provision.

Limitation on Certification Requirements

Section 302 (Elimination of certain certification requirements)

continues the efforts begun in FASA to diminish the number of contract certifications. This provision would prohibit an agency from imposing a non-statutory certification requirement.

We would caution, however, that the elimination of certification requirements that have a statutory basis can work to the detriment of small contractors. The argument that a certification is not needed when the contractor is bound to comply with the underlying statutory requirement sounds reasonable, but may not be practical. Small firms find it more difficult to keep track of the host of statutory requirements applicable to them. Certifications implementing such statutory requirements have the benefit of informing the small contractor of the statutorily-imposed requirement and putting the firm on notice to explore what its obligations are under the statute. Without such certification a small firm may remain ignorant of a statutory obligation which could then be applied against the firm during the course of the contract's administration.

Early Implementation of Authority to Waive Statutes In Testing Innovative Procurement Practices

Section 303 would authorize the Administrator for Federal Procurement Policy to utilize the authority granted by section 5061 of

FASA to waive statutes as part of the authority to conduct tests of innovative procurement procedures.

The small business community remains vehemently opposed to extending authority to the OFPP Administrator to unilaterally waive statutory requirements. Section 15 of the Office of Federal Procurement Policy Act already grants the OFPP Administrator broad authority to conduct tests of innovative procedures, including the authority to waive any needed procurement regulations. However, the authority to waive statutes in support of such test programs requires the Administrator to obtain Congressional approval.

Over the vocal objections of the small business community, Congress granted such authority to waive statutes to the OFPP Administrator, but at least linked the exercise of such authority to the full implementation of FACNET on a government-wide basis. The linkage was done to focus the Administrator's attention on the full implementation on what could be, for small businesses, the most important improvement in the procurement process, the routine use of electronic commerce at all steps in the procurement process, from solicitation to payment. As reported to this Committee by the General Accounting Office on July 28th, the implementation of FACNET is

woefully behind schedule and suffering from a lack of dedicated senior management attention.

The enactment of Section 303 of H.R. 1607 is opposed by the Small Business Working Group, since it would repeal the beneficial linkage established less than a year ago by the Congress.

Procurement Integrity

As noted earlier, Section 305 substantially re-writes the procurement integrity provisions of the Office of Federal Procurement Policy Act. If properly implemented, we believe that these changes could result in more beneficial communications between the government and its prospective customers when the agency is attempting to define how to meet its need and to assess the capabilities of the private sector to respond with cost effective proposals in a resulting competitive procurement. Fostering such communication between industry and government prior to the initiation of an individual procurement action is long over due.

Amendments to OFPP Act

Section 306, (Further Acquisition Streamlining Provisions) makes a series of amendments to the Office of Federal Procurement Policy Act. While most are offered as amendments to eliminate obsolete

provisions, we would urge further consideration be given to the repeal of Section 8, which requires DFPP to report on its activities to the Congress. We would also suggest that Section 2 of the Act (Declaration of Policy) and Section 3 (Findings and Purposes), while not operative law, contain statements about how the process should be conducted that are as appropriate today as when they were first enacted in 1975.

Improving Performance on DOD Major Systems

Sections 307 (Justification of Major Defense Acquisition Programs Not Meeting Goals) is a provision that holds the most promise for deriving substantial dollar savings from H.R. 1670. Section 307 would require that major acquisition programs in the Department of Defense perform on schedule and on budget, or pay budgetary consequences. In our view, the savings that can be derived from improved administration of such major programs, both in Defense and in the civilian agencies, will dwarf any savings that some have asserted could be derived from limiting competition.

Procurement Workforce Improvements

Section 308 (Enhanced Performance Incentives for the Acquisition Workforce) touches upon a key issue in improving the

procurement process as we know it today. That is, improving the performance of the public servants charged with its management. It is essential that good performance be rewarded, but it is equally important that poor performance be penalized. Many of the complaints which small government contractors lodge against the procurement process is not based on the absence of discretion available to contracting officers, but rather a contracting officer's failure to make prompt, judicious, and fair use of the very broad discretion already accorded to them by procurement law and implementing regulations.

Improved Program Management

Section 309 (Results Oriented Acquisition Program Cycle) seeks to reach the same objective as Section 307, that is, rewarding good program management performance and penalizing poor performance. Again, we would observe that this section, like Section 307, also holds significant promise for being a realistic source of substantial savings resulting from the reforms being proposed by this legislation.

Accelerating the Procurement Process

Section 310 (Rapid Contracting Goal) would add a new Section 36 (Rapid Contracting Goal) to the Office of Federal Procurement Policy

Act. It would require the OFPP Administrator to establish a goal of reducing by 50 percent the time necessary for executive agencies to acquire an item for the user of that item. The small business community would urge that in implementing this broad standard, should it be enacted, the Administrator should focus on the delays caused by the executive agencies themselves in the solicitation, award, and administration of contracts. Our fear is that, in pursuing this goal, efforts will be renewed to diminish still further the time currently made available for the advance notice of contracting opportunities and the time provided for the preparation of offers. In the past, these have always been the first target for efforts to accelerate the procurement process. When, in fact, much of the excessive time can be identified in the period between receipt of proposals from the private sector and the making of the award decision by the buying agency, and during contract administration action prior to commencement of performance.

Open-ended Liquidated Damages Provision

Section 312 (Contractor Share of Gains and Losses from Cost, Schedule, and Performance Experience) would add a new section 2306c to Title 10 and a corresponding new section 304D to Title 41.

These new provisions would direct that the FAR be modified to provide for authority to penalize a contractor for "failing to adhere to cost, schedule, or performance parameters to the detriment of the United States". This new performance provision seems to broadly extend the authority of the government to impose liquidated damages on a non-performing contractor. It is essential that the FAR coverage implementing this provision, if enacted, make absolutely clear, as part of the solicitation, any potential penalties to which the contractor may be exposing itself if awarded by the contract.

Prompt Payment

Section 314 (Improved Department of Defense Contract Payment Procedures) requires the General Accounting Office to conduct a review of commercial practices regarding accounts payable and, based upon such review, to develop standards for the Secretary of Defense to consider using to improve DOD's contract payment procedures and financial management systems. The small business community would urge that, in conducting his review, the Comptroller General should be directed to recognize the Congressional standards for government contractor payments specified in the Prompt Payment Act, Office of Management Budget Circular A-125 (Prompt Payment),

and FAR coverage implementing the Act and the Circular. Further, while serious financial management problems have been identified with the regard to the Department of Defense and its payment of contractors, the small business community believes it would be highly inappropriate to have a separate contract payment procedures applicable uniquely to the Department of Defense. Government-wide standards for contractor payment procedures remain essential and the Prompt Payment Act is the statutory framework for any payment system that properly considers the needs of the small business community.

Title IV, Streamlining of Dispute Resolution

The Small Business Working Group believes that an effective bid protest process is vital to sustain the standard and practice of “full and open competition”. We have not had adequate time to review the total re-write of Title IV to determine whether the revised proposal meets that fundamental standard.

Small Business Working Group on Procurement Reform

A broad coalition of small business associations working to foster small business participation in Government contracting opportunities.

American Gear Manufacturers Association
Latin American Management Association (LAMA)
Minority Business Enterprise Legal Defense and Education Fund (MBELDEF)
National Association of Minority Business (NAMB)
National Association of Minority Contractors (NAMC)
National Association of Women Business Owners (NAWBO)
National Center for American Indian Enterprise Development
National Minority Supplier Development Council (NMSDC)
National Federation of Independent Business (NFIB)
National Small Business United (NSBU)
Small Business Legislative Council (SBLC)
Women Construction Owners & Executives, USA (WCOE)

Statement by
Derek J. Vander Schaaf
Deputy Inspector General
Department of Defense
before the
Committee on Small Business
U.S. House of Representatives
on
Acquisition Reform

Madame Chairwoman and Members of the Committee:

I appreciate the opportunity to appear before you today to discuss what can be done to improve the acquisition system. The Office of the Inspector General, Department of Defense (DoD), has been a proactive participant in helping shape acquisition reform policy. We have expressed our views on Administration and congressional proposals to reform acquisition policies and we appreciate that the Department of Defense and the Congress ensured our views were considered as these matters were reviewed.

The challenge facing us is how can the Government buy the goods and services that it needs more efficiently in the commercial marketplace. Many reform measures seek to make it easier for the Government to participate as any other buyer in the marketplace. In doing so, traditional acquisition rules may no longer apply.

UNIQUE ASPECTS OF ACQUISITION REFORM THIS TIME AROUND

The current emphasis on acquisition reform has the basic objective of simplifying the Government contracting and procurement process while reducing costs. These objectives are no different than those sought by many other acquisition reform efforts over the last 30 years. What is unique this time is the degree that this simplification is to be achieved through the use of "standard" commercial practices and procedures. This in turn,

at least in theory, will better integrate our commercial and key military industrial base capacity.

There is no doubt in my mind that use of some commercial practices can help to simplify and make the Government acquisition process more efficient and user friendly. The major challenge to this effort is obtaining a major portion of military products and services from the commercial sector and merging military and commercial capabilities and facilities to maintain a healthy and responsive industrial base. Many of the acquisition reform efforts are directed to eliminating the obstacles to the integration of commercial producers and Defense products. Many reform measures seek to make it easier for the Government to participate as any other buyers in the marketplace. In doing so, traditional acquisition rules may no longer apply. This part of acquisition reform requires a new set of ground rules to state how the Government will participate in the commercial marketplace. The objective is to simplify these ground rules.

Unfortunately, the more we try to simplify the more complex things become. Two weeks ago, at an Acquisition Reform Senior Steering Group meeting, a copy of the Federal Acquisition Regulation provision implementing the rules for commercial acquisition, defining what is a commercial product or service was handed out. The proposed regulation, with comments from DoD, totaled over 200 pages of small, singled spaced print.

As part of our participation in the reform process, we continue to stress that any acquisition reform measures, include new or retain existing statutory language, that provide sound managerial and internal controls and protect the Government's interest.

UNDERLYING PRINCIPLES OF GOVERNMENT PROCUREMENT

Reform can and should result in significant changes to the Government acquisition process. However, some underlying principles of Government procurement must and will remain. For example, the Government will always want to buy its goods and services at the quality and performance levels specified in the contract and at fair and reasonable prices and the Government should provide an opportunity for all qualified suppliers to compete. Our audits of the acquisition system, operating under rules much more stringent than those being proposed for future commercial acquisitions, indicate that DoD procurements present enormous financial risks because of the sheer number of suppliers, diversity of products and large sums being expended.

In the area of product quality alone, the Defense Criminal Investigative Service maintains an active caseload that averages about 400 product substitution cases per year that results in about 100 convictions annually. Past audits of product quality also showed high levels of major nonconformance that made the products unusable or unsafe for intended purposes.

COMPETITION REQUIREMENTS

The legal requirement for competition in public contracting is one of the major differences between Government contracting and contracts involving private parties. The primary reasons for competition in Government contracting are to afford private sector individuals and entities an opportunity to do business with the Government, to obtain lower prices, and to avoid collusion or fraud, unjust favoritism, and abuse in the awarding of contracts. The Competition in Contracting Act has been an important tool in ensuring fair prices and reducing the scandals from overpriced spare parts and supplies. While we have seen savings of 5 to over 90 percent from competition, typically competition results in price reductions of 15 to 30 percent. The Competition in Contracting Act requires the use of competitive contracting procedures unless use of other than competitive procedures can be justified against one of seven statutory exceptions. It further requires contracting officers to justify the use of other than competitive procedures and obtain approval at increasingly higher levels as the value of the contract increases.

H.R. 1670, the "Federal Acquisition Reform Act of 1995", proposes to change the standard of "full and open" competition to an undefined new standard of "maximum practical" or "open access" competition. This change to a "maximum practical" standard could be used to limit competition to only those "prequalified" or

"verified" vendors. I do not agree with limiting access to Government markets because it can deny firms such as new high technology companies the opportunity to bid on Government contracts and deprive us of the benefits of a broader base of suppliers, both large and small. This proposal seems to be a step backwards from trying to entice additional companies to enter the Government market. Contracting officers have flexibility to exercise sound business judgment under the current statute in determining the appropriate acquisition strategy for a procurement. We have not seen any analyses or demonstration of a problem that supports moving away from full and open competition or eliminating the seven exemptions to competition. Further, we see no benefit to adding the words "not feasible" or "not appropriate" to the reasons for not pursuing a competitive strategy.

I am in favor of legislative proposals that would permit the contracting officer to limit the number of offerers in the competitive range, or to use a two-step proposal and evaluation process that would limit the number of contractors competing after the first step. Both of these proposals could reduce the time and resources expended on suppliers who have little or no chance of success. These proposals would also help reduce the burden on contracting officers and the time required to award a contract.

CONTRACT SOLICITATION

For effective competition, potential suppliers must be given enough information to know what are the Government's needs and what they are competing for. The present law requires that specifications in contracts permit full and open competition and include restrictive provisions only to the extent necessary to satisfy the needs of the agency or as authorized by law. H.R. 1670 would repeal this requirement. We are opposed to deleting this requirement because specifications must clearly state agency minimum needs. Inadequate and ambiguous specifications undermine competition. Excessive requirements are also inappropriate and wasteful.

The Competition in Contracting Act requires that a solicitation identify all factors by which an agency reasonably expects to evaluate proposals and their relative importance. We believe that the solicitation must clearly state what factors and subfactors will be scored so competitors can be treated fairly, but we do not agree with the legislative proposal that the entire source selection plan must be included in the solicitation. Agency contracting officers have discretion in whether to disclose a source selection plan to competitors and that discretion should be retained. Source selection plans often contain sensitive information that should not be disclosed prior to contract award, such as the organization, membership and responsibilities of the source selection team. We also believe

that preproposal conference can and should be held with prospective contractors where the procurement involves complicated specifications and requirements. We do not agree that such conferences should be conducted for all procurements because this would impose a significant administrative burden on contracting officer and increase administrative costs and procurement lead time.

CONTRACTOR PERFORMANCE

Under the current statutes, contracting officers are required to consider quality of product and contractor performance in addition to price before awarding a contract. DoD is currently working on systems to collect contractor past performance data and regulations to implement the statutory mandate in the Federal Acquisition Streamlining Act that agencies consider past performance in the award of individual contracts. The proposal in H.R. 1670 to establish a contractor verification system appears to move away from trying to add new vendors to this lists, particularly small manufacturers, and appears to limit suppliers to the past DoD contractors. Currently, DoD uses qualified bidders lists, qualified manufacturers lists and qualified products lists in lieu of a formal system of awards based on past performance. Until the Department is better able to identify and measure past performance, we believe the current system is better than what is proposed in H.R. 1670.

FEE LIMITS

Section 105 of H.R. 1670 seeks to eliminate fee limits on cost contracts. This includes the 15 percent limit on cost-plus-fixed-fee contracts for experimental research and development work, the 10 percent limit on any other cost-plus-fixed-fee contract, and the 6 percent fee limit on architect and engineering (A&E) services contracts. People attempt to justify the change by saying fee limits do not exist in the commercial marketplace and will encourage more bids on contracts. I am unaware of the Government not finding adequate numbers of interested suppliers or of any company going broke because they can only earn a 10 or 15 percent fee on a cost type contract. The A&E fee limit was enacted to preclude the Government from overspending on design and getting ostentatious or grandiose buildings. Our auditors have reviewed thousands of military construction projects. Buildings being erected on military installation are "state of the art" that have won A&E awards, so there is evidence that we are getting quality A&E work. Eliminating the fee limit will make more work for contracting officers and will adversely affect the pricing of \$17 billion of cost type contracts with fixed fees.

The elimination of the fee limits on cost-plus-fixed-fee contracts could result in higher fees on other types of cost reimbursable contracts. Contracting officers often use the 10 percent and 15 percent limitations as a basis to determine

maximum fees on cost-plus-incentive-fee and cost-plus-award-fee contracts. These other types of cost reimbursable contracts account for about another \$30 billion of DoD procurements. Fee limits on Government contracts have been with us since the Continental Congress set fee limits to reduce profiteering during the Revolutionary War.

COMMERCIAL PRODUCTS DEFINITION

Our office not only supported but pushed for expanded use of commercial products to meet DoD needs for many years. We supported the expanded definition of a commercial item that initially evolved from the acquisition reform process and the use of nondevelopmental items whenever possible.

I am concerned about the attempt in H.R. 1670 to create a broader definition of a commercial item or service. I am all for buying commercial items and services. However, it appears to me that current acquisition reform proposals are attempting to define Government and Defense unique items and services as-- commercial items in order to exempt them from coverage of the Truth In Negotiations Act (TINA) and keep Government from gaining auditor access to contractor records. This acquisition reform process seems to be dedicated to removing the contracting officers right to seek cost and pricing data even if he or she cannot establish a fair price by other means.

One section of H.R. 1670 eliminates the words "catalog" which may have the effect of defining any service as commercial. I disagree with this proposal. The DoD spends more on services than we do on hardware. Exceptions to providing cost or pricing data for commercial services are currently limited to installation, maintenance, training and repair services and where "catalog" prices are available for other services. The proposal would make engineering services, consulting, technical support and just about any type of technical labor, a commercial service. This will restrict a contracting officer's ability to obtain certified pricing information and our ability to audit these awards. The pricing of technical, scientific, and engineering services is where the auditors and contracting officers spend a lot of time reviewing prices and negotiating concessions from contractors on prices for various labor categories. What is a little frightening is that this proposed change will allow an estimated \$61 billion of service contracts in the DoD (\$103 billion in the Government), much of which is awarded without competition would be exempted from audit. The Government would give up all rights to cost and price information and all audit rights, except audits that are carried out in direct support of a criminal investigation by examining records that are subpoenaed.

I am opposed to the Section of H.R. 1670 that proposes further changes to the TINA. As presently written, TINA allows an exception to the requirement for providing cost or pricing

data when the agreed upon price is based on established catalog or market prices of commercial items that are sold in substantial quantities to the general public. The proposed legislation would eliminate that exception and apparently replace it with another exception that is a great deal broader. The proposed exception would include all commercial items not just those for which the agreed upon price is based on established catalog or market prices. This is obviously a much broader exception and leaves the contracting officer in a much more difficult position to determine whether the price is fair and reasonable. If the contractor declares that the item is a commercial item, the contracting officer will be unable to request cost or pricing data even when he or she can not establish that the price is fair and reasonable through price analysis.

COST ACCOUNTING STANDARDS

I am also opposed to the proposed change in the Section to provide a blanket waiver of cost accounting standards for any commercial acquisition. The cost accounting standards ensure consistency of accounting among contractors, as well as require that unallowable costs, such as lobbying, entertainment, etc., not be billed to the Government. In order to receive Government financing, the contractor must demonstrate that his accounting practices adequately assign costs to contracts. Therefore, I see no reason why contracts that provides for Government financing

(progress payment) should not include the provisions of the cost accounting standards.

CREATING LOOPHOLES TO THE TRUTH IN NEGOTIATIONS ACT

We disagree with the changes, which create loopholes to the TINA. The Federal Acquisition Streamlining Act changes enacted last year to TINA have not yet been implemented and thus their effect cannot be judged. I suggest that we wait and gain more experience using the recent revision to the TINA before additional changes are enacted.

The prevailing attitude this year seems to be to eliminate use of the TINA and the auditors. The companies and even some DoD officials state that if you eliminate TINA and auditor oversight then the DoD can buy their DoD unique items from contractors at lower prices. Well, if you believe that you will generally receive a better price by eliminating the right to ask for cost and pricing data or the opportunity for auditors to look at a contractor's records, then I have a bridge you will be interested in.

The truth is that requesting cost and pricing data is a common commercial practice. Large companies that have purchasing leverage will generally make their suppliers provide cost and pricing data. Contractors who do business with the Government gripe about TINA yet they will make their own suppliers show them

exactly what a product costs to make before they buy it. If the large company detects they overpaid that supplier, the supplier will probably never get another contract. The Government cannot exercise a similar option to simply exclude a supplier.

THE BENEFITS OF THE TRUTH IN NEGOTIATIONS ACT

A recent Coopers and Lybrand study estimated that unique Government requirements added about 18 percent to the cost of a Defense contract versus a truly commercial contract. The study costs are not applicable to the competition discussion and mainly relate to post award or contract administration requirements, such as quality assurance and use of military standards and military specifications. I also caution against the overall use of the 18 percent because the study was limited to only 10 companies and the study has other limitations and cautions on use of the data. However, let's assume the study is correct when it concludes that TINA typically adds 1.3 percent to the cost of a contract. For FY 1994, the DoD contract reporting system showed that 55,764 contract actions, valued at \$51.1 billion, were subject to TINA and certified as to cost and price data provided the Government. The DCAA reports \$2.0 billion in benefits during FY 1994 from contract price reductions and collections related to TINA. In addition, the criminal investigators recovered about \$100 million related to defective pricing investigations. Thus, the direct quantifiable benefits of TINA are about \$2.1 billion. Using the Coopers and Lybrand

cost drivers for TINA of 1.3 percent times the total applicable purchases of \$51.1 billion, yields a cost for TINA of \$664 million. The benefits outweigh the costs by a ratio of 3 to 1 (\$2.1 billion versus \$664 million) or net dollar benefits of \$1.5 billion.

The benefits of TINA are really far greater than this because none of the intangible benefits "the cop on the block" benefit can be measured. Just imagine what prices will be on some of our contracts if the Government loses all audit rights to look into contractor costs or the right to require contractors to reveal their costs when selling what are really noncommercial items on a noncompetitive basis to the Government.

MORE ACTION NECESSARY TO ENHANCE THE GOVERNMENT'S ABILITY TO BUY
COMMERCIAL WITHOUT TRYING TO ELIMINATE THE TRUTH IN NEGOTIATIONS
ACT

It has been my position that if the Government really wants to "go commercial" and for the Government to fully benefit from simplified acquisition procedures and commercial practices, you have to go a lot further in terms of exemptions from existing statutes, regulations and dollar thresholds.

One area where this could be easily done is in the area of what is often referred to as fungible commercial commodities.

I am talking about such things as steel and other metals, such as aluminum, coal, oil, lumber products.

For the DoD to fully benefit from simplified procedures for the acquisition of fungible commercial commodities, you need to eliminate all domestic source restrictions, Government unique ethics restrictions, socioeconomic requirements (including some small business restrictions) and other miscellaneous restrictions. We identified a list of 37 laws that commercial acquisitions should be exempted from.

One of the problems we have identified is that the laws and regulations that Government imposes on the purchase of commercial items discourages major commercial companies from selling to the DoD. As a result, there are other companies that learn the Government's acquisition rules and procedures and then specialize in selling to the Government. The sales to the Government or just DoD usually represents the majority, if not all, of these firms' sales. Under these circumstances, the Government does not get the benefits from being just another purchaser in a commercial market. We have performed research on the purchases of various commercial commodities, such as wood products, meat, seafood, textiles, where the top 10 suppliers to DoD do not include any of the top 10 sellers of those commodities.

For these fungible commercial commodities, the new \$100,000 simplified threshold serves no purpose other than to create

bureaucracy. If you are buying steel, the simplified acquisition procedures should be the same whether you want to purchase \$100,000 or \$5.0 million.

USE OF SIMPLIFIED ACQUISITION PROCEDURES FOR COMMERCIAL ITEMS

The current rules allow use of simplified procedures for commercial purchases under \$100,000 and reserves these contracts for small business. We support the Section of H.R. 1670 that proposes to allow use of simplified acquisition procedures for commercial items at any dollar value. However, expanded use of simplified acquisition procedures should only apply to "truly commercial" items and not the proposed definition of commercial that industry wants to use. I also do not think purchases of commercial items and services at any dollar value should be reserved for small business.

PROCUREMENT LEAD TIME AND ITS COST

One thing to keep in mind while working on acquisition reform is that there are cost reductions or cost increases for every piece of legislation that results in reduced or additional time to perform a procurement. I have heard there have been discussions about increasing the amount of time a procurement must be announced in synopsis form. The time has been shortened for items procured under the simplified acquisition threshold. We have recently completed extensive work on the

amount of time it takes the different DoD buying centers from recognition that an item needs to be purchased until the contract is awarded. This is called procurement administrative lead time. For example, for purchases under \$25,000, the old small purchase threshold, the lead time ranged from 49 days to 278 days for 16 buying centers. Our work was oriented to helping the DoD reduce administrative lead time through use of performance measures and sharing of streamlining practices. However, it has application here because any new acquisition legislation has the potential to increase or decrease acquisition lead time. Longer administrative lead time requires more items to be purchased and greater holding costs. The factors involved include the cost of money, handling, storage space, obsolescence, safety levels and pilferage. The average cost per day of lead time in the Department was \$9.8 million for materiel contracts regardless of the contract value, \$3 million for contracts under \$25,000 and \$6.8 million for contracts over \$25,000. These types of figures are useful when weighing the risks and benefits of legislation that affect the length of time to perform a procurement.

DETERMINATION OF RESPONSIBILITY

We also need to eliminate the Small business Administration (SBA) right to overrule a contracting officer's determination that a small business should not be awarded a contract because it lacks certain elements of responsibility, such as competency, capability and capacity.

There are plenty of examples where the SBA overruled a contracting officer's initial determination of nonresponsibility. Contracts with these small or disadvantaged businesses often had to be terminated for default, or only after a great deal of technical assistance and delivery schedule extensions, marginal performance was achieved.

Therefore, we suggest that the SBA Certificate of Competency Program be eliminated. We believe that DoD contracting officers make determinations of nonresponsibility with good reason. In this time of streamlining, it is not proper placement of accountability to give another agency of the Federal Government the authority to force a contracting officer to award a contract to any offerer that has quoted an unreasonable low price, or for other reasons has failed a preaward survey. If a review of the contracting officer's actions is needed, we could come in and do this on a case-by-case basis. The current procedures violate the principles of accountability, best value contracting, and performance-based contracting. In fiscal year 1994, there were 762 referrals from the DoD to the SBA for a Certificate of Competency on contracts valued at \$1.3 billion. Only 227 certifications were issued for contracts valued at \$190 million. Thus, over \$1 billion of contracts were delayed an average of 15 days. This problem is not as bad as before because the number of DoD requests for a SBA Certificate of Competency has decreased by 65 percent from 2,157 in FY 1992. The decrease in the number of requests and the very few Certificates issued in FY 1994 may

indicate the program is no longer required. There is a cost to the DoD while awaiting the SBA to make a determination. The cost is part of the overall procurement administrative lead time.

CONTRACTING DIRECTLY WITH SECTION 8(a) COMPANIES

One part of H.R. 1670 would allow a DoD contracting officer to directly contract with a Section 8(a) company. This would eliminate DoD having to go to the SBA to award the Section 8(a) contracts. This is a good reform because it will reduce the administrative lead time for contracts, eliminates a layer of bureaucracy, reduces contract administration costs and does not harm companies. In fiscal year 1994, the DoD had 42,295 contracts, valued at \$2.7 billion, awarded to Section 8(a) companies that were delayed an average of 25 days because the SBA had to make the award. Because of the cost of administrative lead time, we believe that millions of DoD funds can be put to better use if the Department could directly contract with Section 8(a) companies and eliminate the 25 days.

BOARD OF CONTRACT APPEALS

Much has been written about simplifying protests and consolidating the different Boards for contract appeals. This is an area where we have not seen studies or data that show efficiency or cost savings from the proposed legislation. We are all for anything that will make the contracting process easier

and less costly for the parties involved. However, we have not done enough work in the contract protests area to form an opinion as to the best way for the Federal Government to structure its contract appeals or bid protest process.

LET'S GO AFTER THE COST DRIVER TO THE BUYER

Acquisition reform has appropriately pursued changes which can be cost drivers to Defense contractors, but in my opinion, has not gone after even more significant cost drivers to the Government with the same vigor. In this category, I would place small business set-asides, Buy American Act, and domestic content requirements that are applied to many products DoD buys, as well as Davis Bacon, the Service Contract Act and some of the other socioeconomic laws. Certain of these procedures should not apply to those acquisitions below the \$100,000 level (the simplified acquisition threshold) or where commercial practices are being used. Application of these laws to commercial practice is a contradiction in terms.

GENERAL CONCERN WITH ACQUISITION REFORM TO DATE

This is probably a good time to add a few thoughts on some of the concerns I have with the acquisition reform process to date. I happen to believe that the process has been focused to a major extent on those cost drivers that the Defense industry does not like. These cost drivers can, in fact, be burdensome and

inappropriately used, and even when properly applied, they can cost the contractor a lot of time and money while they help to assure the Government gets a quality product at a fair price. I am referring to such things as Competition in Contracting Act, and the Truth in Negotiations Act which help add suppliers and reduce prices. These safeguards and other safeguards have been built into the procurement process in response to past abuse and snafus.

Acquisition reform, especially much of what is being proposed in this second round, is carrying out a long standing industrial or supplier agenda to curtail or eliminate many of these key safeguards which have been built into the United States procurement process over the past 200 years. I broadly categorize these as (1) disclosure requirements, (2) certifications, (3) price reduction requirements, and (4) audit rights. Certain of these safeguards help ensure cost (fair price) and quality, both of which become greater risks as we rely more on commercial products and practices.

While industry strenuously argues that such safeguards are incompatible with commercial sales practices, it is our experience and that of the Inspectors General at the General Services Administration and the Department of Veterans Affairs that large private sector purchasers consistently require these same types of safeguards in their own dealing with suppliers as does the Federal Government.

One of the rallying cries of the current reform initiatives is that the Federal Government should conduct purchases the way an individual does in a discount retail establishment, such as Office Depot or Wal-Mart. However, I believe that the Government, as the nation's largest single potential purchaser, spending about \$200 billion annually buying goods and services, is often in the position of being able to obtain much more favorable pricing and conditions than an individual making small, one-time purchases at a local store. I contend that large corporate purchasers also try to take maximum advantage of their potential purchasing power. The key is balancing the cost of retaining a large acquisition workforce and the costs of running a special quality control and supply and logistics systems against any savings that can be achieved through volume purchases.

Too many procurement reform proposals related to commercial products are based on the faulty assumption that the Government imposes special requirements on the provider community that are different from those that these very same providers impose in turn on their commercial suppliers.

In fact, in the key areas of most-favored customer, special price reductions and audit access, Government practices are very much the same as those found in the commercial arena. In the competitive marketplace, large volume purchasers can and do set conditions because it is in their economic interest to do so.

Madame Chairwoman, that concludes my prepared remarks. I would be happy to take any questions.

The following list of laws should be exempted for simplified acquisition and probably from all acquisitions made for commercial items regardless of dollar value. For each law that should be exempted for commercial items, I am providing rationale for the exemption. A small or large commercial supplier that is thinking of entering the Government market for the first time would probably be disinterested after reading the requirements of the 26 laws. Some progress has been made on acquisition reform by the Congress since last year, because there were 37 laws that should not have applied to the purchases of commercial items.

LAWs THAT SHOULD BE EXEMPTED FOR COMMERCIAL ACQUISITION

Domestic Source Restrictions

41 U.S.C. 10a et. seq., Buy-American Act. The statute requires that domestic end products be procured for public use except where inconsistent with the public interest, the cost is unreasonable, the products are procured for use outside the United States, or the items are not commercially available in the required quantity or quality within the United States. The Act was enacted during a time of economic depression and isolationism and was preceded by the Smoot-Hawley Tariff Act of 1930, which raised tariffs to the highest rates in U.S. history. In response to a request in the 1989 Defense Authorization Act for a report on the impact of statutory Buy American restrictions affecting Department of Defense procurement, the Secretary of Defense recommended that most congressionally mandated restrictions be abolished, future use of Buy American restrictions be avoided, and Congress rely on the authority of the Office of the Secretary of Defense to impose any needed restrictions on DoD procurements. Further, it is extremely difficult to apply the foreign content definition this law requires. Application of current component-oriented restrictions to commercial items may exclude items that DoD wants to buy. The statute should be amended to include a "substantial transformation" test, which would make the statute easier to administer, and exempt acquisitions of commercial items, as defined in Section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)). This Act delays procurement actions, precludes the Department of Defense access to important new technologies, and often increases the price DoD must pay for the goods and services it buys.

10 U.S.C. 2533, Determinations of Public Interest Under the Buy American Act. Congress made Buy American

provisions specifically applicable to the Department of Defense by enacting this provision in the industrial base chapter of Title 10. Although not a strict limitation, the section provides that the Department of Defense appropriations may not be used to procure goods other than American unless consideration is given to bids from small business or other domestic firms, balance of payments impact and shipping and other costs. Exempting acquisitions of commercial items from this statute would result in a more efficient procurement process and open access for all suppliers to compete for Department of Defense procurements.

10 U.S.C. 2534, Miscellaneous Limitations on the Procurement of Goods Other Than United States Goods. The statute, which is only applicable to the Department of Defense, establishes domestic source restrictions on procurements of buses, chemical weapons antidotes, air circuit breakers, valves and machine tools, ball bearings and roller bearings and sonobouys. The statute permits the Secretary of Defense to waive the statute for procurements below the simplified acquisition threshold, to obtain competition and to preclude a United States company from being adversely affected. Exempting acquisitions of commercial items from the statute would result in a more efficient procurement process because determinations to waive the statute would no longer be required for the Department of Defense procurements or procurements made by other agencies on behalf of the Department of Defense.

10 U.S.C. 2631, Supplies: Preference to United States Vessels. The statute restricts the ocean transportation of supplies bought for the Army, Navy, Air Force and Marine Corps to United States vessels provided the freight charges are not excessive or otherwise unreasonable. The statute can create an impediment to the acquisition of commercial items with components that may not have been shipped on United States vessels. The statute contains no exemption for commercial items or procurements under the simplified acquisition threshold. Further, vendors of commercial items may have no idea whether the items were shipped on American or foreign vessels. Exempting acquisitions of commercial items from the statute would streamline the Department of Defense procurement process. The Section 800 Panel recommended that Congress establish an exemption to 10 U.S.C. 2631 for commercial items.

46 U.S.C. App. 1241(b), Requirement in The Merchant Marine Act, 1936, to Ship on American-Flag Commercial Vessels. The statute restricts the transportation of personnel and certain cargoes of Federal agencies to United States vessels. The comments on 10 U.S.C 2631 also apply to this statute.

P.L. 102-396, 9005, Berry Amendment. The provision states that except for small purchases covered by 10 U.S.C. 2304(g), the DoD must procure articles or items of food, clothing, tents, tarpaulins, covers, cotton and other natural fiber products, woven silk or woven silk blends, spun silk yarn for cartridge cloth, synthetic fabric or coated synthetic fabric, canvas products or wool (whether in the form of fiber or yarn or contained in fabrics, materials or manufactured articles), or any item of individual equipment manufactured from or containing such fibers, yarns, fabrics or materials, or specialty metals including stainless steel flatware or hand or measuring tools, that are grown, reprocessed, reused or produced in the United States or its possessions. That restrictive provision limits competition on contracts for many commercial items, increasing the Department of Defense contract costs and administration. Further, it may not be possible for some sellers of commercial items to determine if their products violate this provision.

P.L. 102-396, 9020, Floating Storage of Petroleum. The provision states that no funds available to the Department of Defense may be used for the floating storage of petroleum or petroleum products except in vessels of or belonging to the United States. The comments on 10 U.S.C. 2631 also apply to this provision.

P.L. 102-396, 9033, Supercomputer Capability. The provision states that the Department of Defense may not purchase any supercomputer which is not manufactured in the United States. The comments on 10 U.S.C. 2534 also apply to this provision.

P.L. 102-396, 9040, and P.L. 103-335, 8026, Anchor and Mooring Chain. The provisions state that shipboard anchor and mooring chain 4 inches in diameter and under that are procured by the Department of Defense must be manufactured in the United States from components substantially manufactured in the United States. The provision does not exempt purchases under the simplified acquisition threshold or chain that meets the definition of a commercial item from the procurement restriction.

Such an exemption would improve competition for contracts and reduce contract costs and administration.

P.L. 102-396, 9082, Multibeam Sonar Mapping Systems. The provision restricts procurements of multibeam sonar mapping systems to those manufactured in the United States. The comments on 10 U.S.C. 2534 also apply to this statutory provision.

P.L. 102-396, 9092, Carbon, Alloy, and Armor Steel Plate. The provision prohibits the Department of Defense from procuring carbon, alloy or armor steel plate for use in any Government-owned facility or property under the control of the Department of Defense which are not melted or rolled in the United States or Canada. The comments on 10 U.S.C. 2534 also apply to this statutory provision.

P.L. 102-396, 9108, Four-Ton Dolly Jacks. The provision states that the Department of Defense must procure four-ton dolly jacks that are manufactured in the United States. The comments on 10 U.S.C. 2534 also apply to this statutory provision.

P.L. 102-396, 9151, Carbonyl Iron Powders. The provision states that funds available to the Department of Defense used for a system or item procured by, or provided to, the Department of Defense that contain manufactured carbonyl iron powders shall be available only for a system or item containing domestically manufactured carbonyl powders. The comments on 10 U.S.C. 2534 also apply to this statutory provision.

P.L. 102-484, 832, Ball Bearings and Roller Bearings. The provision states that during fiscal years 1993, 1994, and 1995 the Department of Defense may not procure ball bearings or roller bearings other than in accordance with part 225 of the Defense Federal Acquisition Regulation Supplement. There is a provision in Section 805 of the House National Defense Authorization Act for FY 1996 to extend this prohibition. The comments on 10 U.S.C. 2534 also apply to this statutory provision.

Socioeconomic Requirements

41 U.S.C. 351-358, Service Contract Act of 1965. The Act applies to Federal contracts in excess of \$2,500 if the principal purpose of the contract is to furnish services in the United States through the use of service employees. The Act requires that contractors pay service employees the minimum wage prevailing in the locality and

provide specified minimum fringe benefits. It also prohibits employment under hazardous or unsanitary conditions. The Act was intended to fill the gap left by the Walsh-Healey Act, which covered workers on supply contracts, and the Davis-Bacon Act, which covered construction workers. Programmatic and interpretive uncertainties caused by the vagueness in key areas of the Act have hampered the effectiveness of the law and made the Act difficult to administer and enforce with small companies and on small dollar contracts. Exempting the statute from acquisition of commercial items and services would further reduce paperwork, streamline the procurement process and reduce the costs of awarding and administering Government contracts.

41 U.S.C. 35-45, Walsh-Healey Act. The Act applies to Government procurements for the manufacture or furnishing of materials, supplies, articles and equipment in excess of \$10,000. The Act requires contractors to agree to pay at least the minimum wage to all employees, that no employee shall work in excess of 40 hours a week unless paid at time and one-half, not to use convict labor or persons under age 18, and that employment is not under unsanitary or hazardous conditions. The law does not apply to Government purchases of perishables, agricultural or farm products, or to "purchases of such materials, supplies, articles or equipment as may be bought in the open market." However, the later exemption has been narrowly interpreted by the Department of Labor. Amending the Act to clarify that it does not apply with respect to acquisition of commercial items would clarify the open market exemption and streamline the acquisition process.

15 U.S.C. 631 et. seq., Small Business Act of 1958. The purpose of the Act is to foster the development of small business in the United States and to increase its role in the national economy. As a result of the Act, a number of programs have been undertaken to increase procurements from small and small disadvantaged businesses. The current system is complex, confusing to commercial vendors or manufacturers and time-consuming, with certification and eligibility criteria that vary by program and agency. Uncertain and frequently changing program goals represent an administrative burden on the Federal procurement process that adds time and cost. Reporting requirements and involvement of the Small Business Administration are also impediments that add little or no value to the process for most procurements. Exempting the acquisition of commercial items and services from the Act would simplify

the contracting process and make it easier for small and large businesses of all kinds to compete for the contracts.

41 U.S.C. 46-48c, Javits-Wagner-O'Day Act. The Act established the Committee for the Purchase from the Blind and other Severely Handicapped, which is empowered to make rules and regulations to promote the purchase of commodities and services from the blind and other severely handicapped. The Committee publishes a list of the commodities produced by non-profit organizations employing blind and severely handicapped persons. Federal agencies are required to procure items from sources on the list unless the sources cannot provide the items in the required timeframe. Exempting procurements of commercial items would streamline the procurement process and open access to Government markets for the supply of commercial items to all suppliers.

Miscellaneous Restrictions

10 U.S.C. 2320, Rights in Technical Data. The statute provides that the Secretary of Defense will prescribe regulations to define the legitimate interest of the United States and a contractor or subcontractor in technical data pertaining to an item or process. The statute recognizes items, components and processes that are privately developed, developed with Government funds, and developed in part with private and part with Government funds. Historically, the implementation of the statute has been a source of conflict and confusion for the Government and contractors. The Section 800 Panel recommended that 10 U.S.C. 2320(a)(3) be amended to limit the applicability of the statute to commercial items. Exempting acquisitions of commercial items and technologies from the statute would streamline the acquisition process and clarify boundaries for the Government in pursuing data rights for full and open competition.

10 U.S.C. 2321, Validation of Proprietary Data Restrictions. The statute applies to any contract for supplies or services entered into by the DoD that includes provisions for the delivery of technical data. The statute provides that a contractor and any subcontractor must be prepared to furnish a written justification to the contracting officer for any use or release restriction. The Federal Acquisition Streamlining Act of 1994 amended the statute to provide that in the case of a challenge to a use or release restriction that is asserted with respect to technical

data of a contractor or subcontractor under a contract for commercial items, the contracting officer shall presume that the contractor or subcontractor has justified the restriction on the basis that the item was developed exclusively at private expense, whether or not the contractor or subcontractor submits a justification in response to the challenge. Exempting acquisitions of commercial items from the applicability of the statute would further simplify administration and enhance competition of suppliers of commercial items for Government contracts.

10 U.S.C. 2402, Prohibition on Limitation of Subcontractor Direct Sales. The statute prohibits DoD prime contractors from entering into any agreement with a subcontractor that prevents the subcontractor from selling any item or process directly to the Government. Subsection (c) of the statute exempts contracts that are below the simplified acquisition threshold. The flowdown of this provision to subcontractors is not consistent with commercial practices.

18 U.S.C. 4124, Purchase of Prison-Made Products by Federal Departments. The statute requires Federal agencies to procure products, which are generally commercial items such as furniture, cable assemblies and printing, from the Federal Prison Industries. The Federal Prison Industries provides rehabilitative training and employment skills for Federal prison inmates. The small business community has strongly objected to the mandatory preferential treatment that the Federal Prison Industries receives in the award of Government contracts. The statute should be amended to exempt commercial items from the mandatory preference for the Federal Prison Industries.

29 U.S.C. 793, Rehabilitation Act of 1973. The statute requires affirmative action for employment and advancement of qualified individuals with disabilities and applies to companies that receive any Government contract in excess of \$10,000. The provisions of the statute also flow down on subcontracts in excess of \$10,000. The Department of Labor is responsible for enforcement and may waive the requirements of the statute for contractor facilities that are separate and distinct from the facilities related to performance of the Government contract. The statute should be exempted for procurements of commercial items and services because commercial sellers should be able to utilize their established facilities, supplier networks and other commercial business procedures in performing Government contracts.

Further, discrimination against the handicapped is prohibited for all employers under the Americans with Disabilities Act.

31 U.S.C. 1352, Byrd Amendment. The statute prohibits recipients and requesters of Federal contracts from using appropriated funds to lobby executive and legislative branch officials in the awarding of contracts. The statute requires requesters and recipients of contracts that exceed \$100,000 to certify that no prohibited payments have been or will be made, and to disclose certain lobbying activities paid for with non-Federal funds. The Act and implementing regulations are complex and impose an administrative burden on Federal agencies and contractors. It is not clear whether the Act has had any significant impact on lobbying. Exempting procurements of commercial items and services from the statute would streamline the acquisition process by eliminating a certification and record keeping burden.

38 U.S.C. 4212, Veteran's Employment Emphasis Under Federal Contracts. The statute provides that any contract in excess of \$10,000 or more shall contain a provision requiring the contractor to take affirmative action to employ and advance qualified special disabled veterans and veterans of the Vietnam era. The statute also requires the flow down of the provision in any subcontract entered into by a prime contractor in carrying out the contract. The statute requires contractors to list openings with local employment service offices, which shall give veterans priority in referral to such employment openings. The Department of Labor is responsible for enforcement of the statute. Acquisitions of commercial items and services should be exempted from the statute. Commercial sellers should be able to utilize their established facilities, supplier networks and other commercial business procedures in performing Government contracts.

41 U.S.C. 51-58, Anti-Kickback Act. The statute prohibits payments to any prime contractor or any employee of the prime contractor from any subcontractor. Violation of the Act voids the contract. Although many companies prohibit payments by sub-contractors to employees, commercial practice typically permits some forms of gratuities, such as meals or entertainment, that are prohibited by this law. Accordingly, it constitutes a burden for sellers of commercial items to "police" existing supplier networks to ensure compliance for occasional Government contracts.

I believe that the truly commercial items could be more easily bought, regardless of dollar value, by use of procedures similar to those that apply to purchases below the simplified acquisition threshold and with exemptions for the 26 laws, cited earlier, that should not apply. The definition of commercial items I propose for this category of procurements is a combination of the pre-FASA definition and the definition at 41 U.S.C. 403(12)(A) for commercial items. The commercial item means any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes, and that has been sold, leased, or licensed to the general public at catalog or market prices.

The proposed change deletes the requirement for recoupment of a proportionate amount of nonrecurring costs for research, development and production of major Defense equipment being sold to another country. The Department has already provided a blanket waiver for the recovery on nonrecurring research and development costs on nonmajor items. This waiver did not require a statutory change. The premise for extending the waiver to major equipment is that doing so will facilitate the transfer of technology between Government and commercial operations; increase U.S. competitiveness in worldwide markets; and enhance national security by preserving the industrial base.

However, current law and regulations allow the surcharge to be waived if the charge is an impediment to any sale that the U.S. Government considers particularly important and where the waiver could be the difference between a sale or no sale. Requests for waivers are invariably granted. The Department of Defense waived \$773 million in nonrecurring cost charges for FYs 1991 through 1994. Some refer to the charge as a tax when, in fact, it is a refund to the U.S. Treasury of a proportionate amount of Department of Defense research and development funds provided to the contractor to develop the item.

Nonrecurring research and development cost collections added about \$181 million to the U.S. Treasury in FY 1994 and the Defense Security Assistance Agency estimates that an additional \$1 billion will be collected during FYs 1995 to 2000. If the proposed waiver provision is applied to only new sales, then \$148 million (\$25 million in 1988, \$48 million in 1999 and \$70 million in 2000) of the \$1 billion estimate will not be collected during those years. However, between 2001 and 2005, no recoveries will be made. If recoupments are stopped, another source of revenue will be needed to offset the noncollection.

It has also been argued that repeal is needed to improve the competitiveness of U.S. companies selling military hardware. We recently analyzed a report by the Congressional Research Service, "Conventional Arms Transfers to Developing Nations, 1987-1994."

Insert Table (see attached).

ANALYSIS OF DATA IN THE CONGRESSIONAL RESEARCH SERVICE REPORT,
"CONVENTIONAL ARMS TRANSFERS TO DEVELOPING NATIONS 1987-1994"

		Arms Transfer Agreements With The World (In Millions of 1994 Constant U.S. Dollars)						Total
		1987	1988	1989	1990	1991	1992	
United States	\$11,984		\$15,749	\$14,132	\$22,578	\$21,288	\$24,568	\$147,053
All Others	<u>63,522</u>	<u>62,841</u>	<u>44,300</u>	<u>44,300</u>	<u>29,348</u>	<u>18,054</u>	<u>16,320</u>	<u>272,785</u>
Total	\$75,506	\$78,590	\$58,432	\$51,923	\$39,342	\$40,888	\$35,942	\$419,838

o For the 4-year period ending in 1994, the United States sold 51 percent of all military arms in the world.

o Since 1990, the United States has been in first place in a comparison of countries selling military arms, Russia was in first place during 1987 to 1990.

o In comparing the periods 1987-1990 to the period 1991-1994, only the United States registered an increase (62.8 percent) in the value of arms transferred. In a comparison of the same periods, China declined by 80.4 percent, Russia fell by 78.6 percent, the United Kingdom fell by 70.6 percent, and France declined by 51.6 percent.

o The total value of arms transfers by all suppliers worldwide, 1991-1994 (\$155 billion) was substantially less than the value of arms transfers from 1987-1990 (\$264 billion), a decline of 42 percent.

o In 1994, the value of all arms transfer agreements worldwide (\$35 billion) was the lowest of any year during the period from 1987-1994. For 5 of the last 6 years, worldwide arms transfers have declined from the previous year's total. This pattern reflects the impact of the end of the Iran-Iraq War, the winding down of other major regional conflicts, as well as the end of the Cold War.

The report indicate the United States maintained a dominant position in the sales of military hardware since 1990, although the total amount of sales is declining because of many factors. My opinion is that there is no need to eliminate the recoupment requirement when recoupments can be waived on a case-by-case basis.

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202-2884



SEP 7 1995

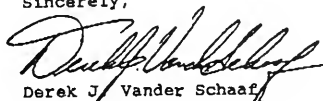
Honorable Cardiss Collins
Ranking Minority Member
Committee on Government Reform
and Oversight
House of Representatives
Washington, D.C. 20515-6143

Dear Mr. Collins:

In reply to your staff's recent request for comments on Title I of H.R. 1670, "Federal Acquisition Reform Act of 1995", as reported from the committee, the Appended comments are forwarded for your consideration. In general, we find the proposed changes in Title I move away from a known standard of "full and open competition," are unnecessary and will confuse both potential suppliers and Government contracting personnel as to what level or standard for competition is required.

I hope the information is helpful as the Congress continues consideration of this important issue. If we can be of further assistance, please contact me or Mr. John R. Crane, Office of Congressional Liaison, at (703) 604-8324.

Sincerely,



Derek J. Vander Schaaf
Deputy Inspector General

Enclosure

cc: Honorable William F. Clinger
Chairman

INSPECTOR GENERAL, DEPARTMENT OF DEFENSE, COMMENTS ON TITLE I OF
H.R. 1670, THE FEDERAL ACQUISITION REFORM ACT OF 1995,
as Reported From the Committee on Government Reform and Oversight

Section 101, Improvement of Competition Requirements.

Subsection (a)(1) would amend 10 U.S.C. 2304 to clarify the statutory preference for the use of "full and open competition." Specifically, 10 U.S.C. 2304(a)(1) would be amended to state that full and open competition will provide for "open access" and will be consistent with the need to efficiently fulfill Government requirements. Paragraph (a)(1) of the statute states that full and open competition will be obtained through competitive procedures in accordance with the requirements of this chapter and the Federal Acquisition Regulation (FAR). Also, paragraph (a)(2) would be amended by adding a new condition (iii) stating that it is not necessary to conduct discussions with the responding sources about their bids. Paragraph (b) would be amended by deleting the specific circumstances under which an agency could exclude a particular source from competing for a procurement, and inserting a statement that the FAR will set forth the circumstances under which a particular source may be excluded. The proposed paragraph (d) retains the seven current exceptions to the use of full and open competition, but states that standards for determining when the use of competitive procedures is not feasible or appropriate shall be set forth in the FAR and that a justification and approval need not be prepared for noncompetitive procurements of commercial items using simplified procedures or in an amount below the simplified acquisition threshold. The proposed rewrite of 10 U.S.C. 2304 would also delete approval and content requirements for justification and approval documents, and the requirement for the Department of Defense (DoD) to issue guidance pertaining to how contractors may allocate overhead to spare parts procurements and to identification of spare parts that contractors did not manufacture or contribute significant value. With the exception of authorizing simplified procedures for procuring truly commercial items, we disagree with the proposed changes to 10 U.S.C. 2304 because of the following:

o It is not clear what statutory shortcomings the proposed changes are intended to fix. We have not seen any analyses or demonstration of a problem that supports moving away from full and open competition.

o The changes will lessen the opportunities for effective competition and deprive the Government of the benefits of a broader base of suppliers, both large and small.

o Contracting officers should not be allowed to make decisions without a written justification for a sole-source acquisition under the simplified acquisition threshold. About 99 percent of the contract actions in the DoD are under the

simplified acquisition threshold. Only 1 percent of the DoD procurement actions are greater than the simplified acquisition threshold and many of those are already noncompetitive.

o Several changes are based on the assumption that the writers of the FAR can define better standards and criteria than those in the existing statute. We do not believe this will occur.

o The requirement for contractors to identify parts they did not manufacture or contribute significant value to was enacted to help eliminate overpricing of spare parts. Pricing of DoD spare parts procurements has gotten better during the last 10 years, but problems still persist as evidenced by Inspector General, DoD, Report No. 93-105, "Procurement of Spare Parts and Supplies," June 4, 1993.

We support a proposed change to allow use of more simplified procedures for commercial items under the simplified acquisition threshold and can provide a list of 27 laws that should be exempt for commercial item purchases. For truly commercial items such as steel or coal, the threshold should be increased. However, expanded use of simplified acquisition procedures should only apply to truly commercial items that are sold in substantial quantities in the commercial marketplace based on catalogue or market prices. This definition is more restrictive than the definition of commercial items in 41 U.S.C. 403(12). We also believe that purchases of commercial items at any dollar value should be competitive, should not be reserved for small business, and any increase in the threshold should be linked to implementation and use of the Federal Acquisition Computer Network.

Subsection (a)(2) would move 10 U.S.C. 2304(j) from the competition section to a new section, 10 U.S.C. 2304f called "Merit-based selection" and redesignate subsections. We disagree with the propose change because its need is not apparent, and seems to further confuse the competition standard to be applied for the awarding of Government contracts.

Subsection (a)(3) is a clerical amendment that would add 10 U.S.C. 2304f to the table of sections. Since we disagree with subsection (a)(2), we also disagree with this change.

Subsection (b) would make the same changes to 41 U.S.C. 253 for civilian agencies as proposed in subsection (a)(1) to 10 U.S.C. 2304, except for the DoD-unique provisions pertaining to procurement of spare parts. Our comments disagreeing with the changes in subsection (a)(1) also apply to subsection (b).

Subsection (c)(1) would amend 41 U.S.C. 416(a) by raising the threshold for publicizing DoD solicitations from \$5,000 to \$10,000 to eliminate threshold differences between DoD and civilian agencies. Another change would also eliminate the

requirement that contracting officers consider each responsive offer that is received on time. We support amending the statute to establish uniform procurement notice thresholds for the DoD and civilian agencies. The purpose of the preaward notice is to inform all potential offerers of the solicitation who believe they can meet the agency's needs. We do not support deleting the requirement that contracting officers consider all responsive offers.

Subsection (c) (2) (A) would amend 41 U.S.C. 416(b) to require the notice to state whether the acquisition will be conducted pursuant to a contractor verification system. A contractor verification system would allow the contracting officer to limit competition to contractors with known capabilities. We support the provision so long as the intent is not to exclude new vendors, particularly small businesses, from seeking Government contracts and limit suppliers to past or present DoD contractors. Further, DoD contracting officers are required to consider past performance in the award of a contract. However, we are unaware of any past performance system that is broad enough in scope or accurate enough to rely on.

Subsection (c) (2) (B) amends 41 U.S.C. 416(b) (4) to eliminate the requirement that each bid, proposal, or quotation that is received on time be considered by the contracting officer. Our comments disagreeing with the proposed change in subsection (c) (1) also apply to this subsection since it restricts competition.

Subsection (d) (1) amends 41 U.S.C. 414 to incorporate the proposed statutory preference for "open access" into the executive agency responsibilities, and to state that an agency's responsibility is to "promote" rather than to "achieve" competition. We do not support the changes for the reasons discussed in subsection (a) (1). Also, competition is not a procurement procedure, but an objective which a procedure is designed to attain. Therefore, the word "achieve" is preferable to "promote."

Subsection (d) (2) would also amend 41 U.S.C. 418 to delete the reference to the date of enactment of the Competition in Contracting Act. We do not object to the proposed amendment.

Section 102, Definitions Relating to Competition Requirements. Subsection (a) would revise the definition in 41 U.S.C. 403 for "competitive procedures" and add a definition for "open access". We disagree with the changes. The revised definition of competitive procedures would allow the contracting officer to limit competition on the basis of efficiency. From our point of view, a definition for open access is not needed because under the current statutes, all responsible sources are permitted to submit bids or proposals.

Subsections (b)(1) and (b)(2)(A) are conforming amendments that would amend 41 U.S.C. 418 and 10 U.S.C. 2302(2), respectively, to provide for full and open competition "that provides open access and is consistent with the need to efficiently fulfill the Government's requirements". We disagree with the changes because we believe this is a further attempt to limit the use of full and open competitive procedures.

Subsection (b)(2)(B) is a conforming amendment that would amend 10 U.S.C. 2302(3)(D) by deleting reference to the term "full and open competition" and would insert "open access" in the list of terms defined in 41 U.S.C. 403. We disagree with the amendment for the reasons previously stated.

Subsection (b)(2)(C) would amend 10 U.S.C. 2323(e)(3) by changing "less than full and open" to "procedures other than" competitive procedures. We disagree with this change because we want to retain the full and open standard.

Subsection (b)(2)(D) would amend 10 U.S.C. 2323(i)(3) by striking out "full and open". We object to the clerical amendment because we want to retain the full and open standard.

Subsection (b)(3) are clerical amendments to 41 U.S.C. 251 et seq. that parallel the clerical amendments in subsection (b)(2). We disagree with this change because we want to retain the full and open standard.

Subsection (b)(4) amends Section 7102 of the Federal Acquisition Streamlining Act of 1994, subsection (a)(1)(A), which pertains to contracting with small business concerns owned and controlled by socially and economically disadvantaged individuals, by deleting "less than full and open competition" and inserting "procedures other than competitive procedures". We disagree with this change because we want to retain the full and open standard.

Section 103. Contract Solicitation Amendments. Subsection (a)(1) would amend 10 U.S.C. 2305 (a)(1)(A) and (B) by deleting the requirements that procurement planning and solicitations achieve full and open competition. We disagree with the changes because the changes would further restrict the use of full and open competition.

Subsection (a)(2) would amend 10 U.S.C. 2305(a)(2) to allow an exception to certain solicitation requirements for the procurement of commercial items using simplified procedures. We agree with the change to increase the threshold for commercial items provided a full and open competitive standard remains in place. See our comments on Section 101(a)(1).

Subsection (a)(3) would amend 10 U.S.C. 2305(b)(4)(A) to require contracting officers to conduct discussions with "the" rather than "all" responsible offerers with proposals in the

competitive range. We do not understand what statutory shortcoming the change is intended to correct. The change appears to limit the offerers who are responsible. We do not support the change.

Subsection (b) would amend 41 U.S.C. 253a governing civilian agency acquisitions in the same manner as proposed in subsection (a). Our comments on subsection (a) also apply to subsection (b).

Section 104. Preaward Debriefings. Subsection (a) would amend 10 U.S.C. 2305(b) to clarify the policy for debriefing unsuccessful offerers prior to the award of a contract. We agree with the proposed changes. The changes would simplify the requirement for debriefing unsuccessful offerers prior to contract award and may eliminate some needless protests. The changes also grant the contracting officer additional discretion whether a debriefing is required, and clarify what the debriefing should cover.

Subsection (b) would amend 41 U.S.C. 253b governing civilian agency acquisitions in the same manner as proposed in subsection (a). Our comments on subsection (a) also apply to subsection (b).

Section 105. Contract Types. Subsection (a)(1)(A) would amend 10 U.S.C. 2306(a) to clarify that the selection of contract type should be governed by market conditions, established commercial practice and sound business judgment. We agree with the change.

Subsection (a)(1)(B) would amend 10 U.S.C. 2306 by deleting subsections:

- o (b), which authorizes contracting officers to require contractors to warrant that they will not pay any fee contingent on the securing of the contract award;

- o (d), which establishes fee limitations for cost-plus-a-fixed-fee contracts and architectural or engineering (A&E) contracts;

- o (e), which requires the contractor on cost and cost-plus-a-fixed-fee (CPFF) contracts to notify the agency before entering into any CPFF subcontract, or fixed-price subcontract or purchase order that exceeds the simplified acquisition threshold, or 5 percent of the estimated prime contract, whichever is greater;

- o (f), which are the "Truth-In-Negotiations Act" (TINA) provisions that require certain contractors and subcontractors to submit cost or pricing data; and

o (h), which references multiyear contracting authority authorized in 10 U.S.C. 2306b.

We disagree with deleting the prohibition on payment of contingency fees or the elimination of the limits on fees on CPFF and A&E contracts in 10 U.S.C. 2306(b) and (d). As a matter of public policy, contractors should not pay contingency fees to someone for soliciting or brokering for them to obtain Federal contracts. The fee limitations on A&E contracts should be retained because the statute limits how much the DoD can spend designing projects and prevents overspending on design efforts to the detriment of actual construction. The statute also helps to limit the Government's risk of investing in an expensive design for a project. We have audited hundreds of military construction projects and have never seen a lack of competition for the design work or higher construction prices due to the fee limits. The fee limitations on CPFF contracts provide a reasonable framework for the contracting officer to use in negotiating CPFF contracts and still allow the contracting officer flexibility to reward contractors according to different risk situations. Contractors have less financial risk on level-of-effort and completion type CPFF contracts than any of the other contract types. Eliminating the statutory limitations on fees for CPFF contracts would likely result in varying interpretations by contracting officers and higher fees on some CPFF contracts. Also, contracting officers often apply the 10 and 15 percent limitations to maximum fees on cost-plus-incentive-fee (CPIF) and cost-plus-award-fee (CPAF) contracts. In 1993, the DoD awarded about \$47 billion of cost-type contracts, of which about \$17 billion were CPFF contracts. Thus, a lot of contracts will be affected. Further, the history of fee limits on DoD contracts dates back to the Continental Congress who imposed fees to preclude excessive profits. The use of fee limits has worked well limiting profits to a reasonable amount. Also, we have seen no study or facts that support the contention that fee limits are not used in the commercial market.

We have no objection to deleting the requirement for consent to subcontract, and the references to the TINA provisions or multiyear contracting authority in 10 U.S.C. 2306(e), (f), and (h). In the case of a contractor having an approved purchasing system, the Government should be reasonably assured that its interests are protected; thus, the consent requirement is unnecessary. On contracts where the contractor does not have an approved system, the risk may not warrant the administrative burden placed on the Government to approve subcontracts. Also, consent to subcontract requires time, which may delay delivery of the goods or services on the contracts. Requirements in contracts for consent to subcontract should be limited to those situations that the contracting officer considers high risk. Requirements relating to TINA and multiyear contracting are covered in other statutes.

Subsection (a)(1)(C) is a clerical amendment that redesignates subsections in 10 U.S.C. 2306. Subject to the comments on the previous changes in this section, we do not object to the amendment.

Subsection (a)(2) would change the title of 10 U.S.C. 2306 from "Kinds of Contracts" to "Contract Types". We do not object to the change.

Subsection (b) would amend 41 U.S.C. 254 governing civilian agency acquisitions in the same manner as proposed in subsection (a). Our comments on subsection (a) also apply to subsection (b).

Subsection (c) would repeal 10 U.S.C. 4540, 7212, and 9540, which cover procurement of A&E services by the Army, the Navy, and the Air Force, respectively. Subsection (d) would consolidate authority for contracts for A&E services in one statute, 10 U.S.C. 2355. We agree with the proposed changes in subsections (c) and (d).

Section 106, Contractor Performance. Subsection (a) would amend 41 U.S.C. 401, et seq., by adding a new Section 35 that provides for a contractor verification system for procurement of particular property or services that are procured by executive agencies on a repetitive basis. Procedures for the system would be defined in the FAR. Subsection (b) would repeal 10 U.S.C. 2319 and 41 U.S.C. 253c, which provide policies and procedures that encourage new contractors to seek Government contracts and explain qualification requirements. We do not support subsections (a) and (b). Establishing a detailed procedure for new contractors to qualify helps competition in contracting, reduces costs, enhances industry responsiveness, and maintains integrity in the expenditure of public funds by ensuring that contracts are awarded on the basis of merit rather than favoritism. Under the current statute, contracting officers should also consider quality of product and contractor performance in addition to price before awarding a contract. We believe this proposal goes away from trying to add new vendors to DoD supplier lists and appears to limit suppliers to past or current DoD contractors.

Subsection (c) is clerical amendments that would add the new Section 35 to the table of contents of the Office of Procurement Policy Act, and that would delete 10 U.S.C. 2319 and 41 U.S.C. 253c for the applicable tables of sections in the U.S. Code. We disagree with the changes based on our comments on subsections (a) and (b).



General Services Administration
Office of Inspector General
Washington, DC 20405



SEP 7 1995

The Honorable Cardiss Collins
Ranking Committee Member
Committee on Government Reform and Oversight
House of Representatives
Washington, DC 20515

Subject: Comments on H.R. 1670, the Federal Acquisition
Reform Act of 1995

Dear Representative Collins:

This letter is in response to your staff's recent request for comments relaying the position of the Office of Inspector General, General Services Administration (GSA) on H.R. 1670, the Federal Acquisition Reform Act of 1995, as it was reported out of the House of Representatives on August 1, 1995. We have also attached for your use and information copies of comments prepared by the Office of Inspector General in response to GSA and Office of Management and Budget requests on H.R. 1795, the Federal Acquisition Improvement Act of 1995, and Title VIII of H.R. 1530, the Acquisition Policy provisions of the National Defense Authorization Act, two related measures. In this letter, we have confined our comments to the proposed amendments to the Truth in Negotiations Act (TINA), contained in Title II of H.R. 1670, which would most directly impact contracts under GSA's Multiple Award Schedule (MAS) program.

Generally, we oppose the amendments to the Truth in Negotiations Act contained in Title II of H.R. 1670 titled "Commercial Items." If enacted, we believe these provisions would reduce the authority of contracting officials to obtain price reasonableness information and would significantly impair the Government's ability to obtain fair and reasonable prices on commercial items in general and MAS items in particular. Further, we feel it is more prudent, in light of the extensive and not yet fully implemented changes to TINA and other acquisition laws enacted last year in the Federal Acquisition Streamlining Act (FASA) of 1994, Pub. L. No. 103-355, to forego consideration of additional legislation in this area until results generated by FASA can be assessed and evaluated.

The Truth in Negotiations Act

As amended last year by FASA, TINA generally requires that offerors for negotiated government contracts expected to exceed \$500,000 in price must make certified cost or pricing information available to

the Government for the purpose of negotiations. 41 U.S.C. § 254b. TINA also provides for three main exceptions to this general requirement, *i.e.*, if the contract price is based on adequate price competition, an established catalog or market price of commercial items that are sold in substantial quantities to the general public, or a price set by law or regulation. 41 U.S.C. § 254b(b). TINA, as amended by FASA, also provides the head of a contracting activity with an affirmative statutory right to require information other than certified cost or pricing data to be submitted when necessary to determine whether a proposed contract price is reasonable. 41 U.S.C. § 254b(c)(2). Contracting officials use this additional information, which can include pricing information, sales information, or marketing information, in order to determine whether an offered price is fair and reasonable. Contracting officers perform price analyses using a variety of methods, including comparing offered prices with previously offered prices or comparing offered prices with industry-published price lists or indices.

Last year, FASA established a new exception from TINA's information submission requirements for commercial item procurements that are not covered by the three standard TINA exceptions. This new exception provides that offerors need not submit cost or pricing data if the offered item is a commercial item and the procurement is conducted on a competitive basis. If it is not possible to conduct a commercial item procurement on a competitive basis, such as when an offered item is a newly developed item not yet introduced in the marketplace, FASA also provides that offerors nevertheless need not submit cost or pricing data, so long as price reasonableness information is available and adequate for the contracting officer to perform a price analysis. Specifically, for noncompetitive commercial items procurements, FASA enacted a requirement that contracting officers obtain information on prices at which the same or similar items have actually been sold in the commercial marketplace. 41 U.S.C. § 254b(d)(2)(A)(ii). Although this authority is somewhat circumscribed by accompanying limitations on the form of information and amount of sales data a contracting officer can seek to obtain, TINA contains an affirmative statutory mandate that other price reasonableness information be sought in procurements involving commercial items without actual commercial sales histories. Finally, if adequate pricing information related to actual marketplace sales is not available, TINA provides that a contracting officer may require a contractor to submit cost or pricing data. 41 U.S.C. § 254b(d)(2)(C).

H.R. 1670's Proposed Amendments to TINA

The Federal Acquisition Reform Act, as reported out of the Committee on Government Reform and Oversight on August 1, would change significantly and detrimentally the careful balance involving commercial items procurements that currently exists in

TINA as a result of FASA's amendments. Most importantly, H.R. 1670 would eliminate TINA's catalog or market price exception, put in place when TINA was enacted in 1962, and replace it with a blanket exception for all commercial items procurements. Thus, if an offered item meets the broad definition of "commercial item," the offeror would be exempt from TINA's information submission requirements.¹ H.R. 1670 would also eliminate the statutory TINA provision which grants the procuring activity head affirmative authority to require information other than certified cost or pricing data on excepted procurements. In its place, H.R. 1670 would substitute a provision that merely requires the FAR to contain a list of the types of information that contracting officers can consider in performing price analyses. Further, H.R. 1670 would also place limitations on a contracting officer's performance of a price analysis, relating to the form of information requested and requests for sales data. These limitations would apply to all procurements under the new broad commercial items exception. Finally, H.R. 1670 would eliminate the separate, explicit TINA provision which affirmatively allows contracting officers to obtain certified cost and pricing information from contractors offering commercial items without actual sales histories, if the contracting officer makes a written determination that the agency is unable to obtain adequate price reasonableness information.

Impact on GSA MAS Program

We believe the TINA amendments proposed by H.R. 1670 will curb the ability of Government contracting officials to negotiate fair and reasonable prices for commercial items procurements, including contracts under the Multiple Award Schedule (MAS) program which generates \$9 billion annually in sales. The MAS program consists of approximately 7,500 contracts covering about 135 different commodity schedules, containing products ranging from office furniture to mainframe computers and scientific equipment. MAS contracts are negotiated contracts established with more than one contractor for the delivery of comparable commercial supplies or services. Executive agencies can order commercially available,

¹FASA enacted a new, expansive definition of "commercial item." Commercial items are defined by statute to mean any item that is of a type that is customarily used by the general public and that has either been sold, leased, or licensed to the general public or has been offered for sale, lease, or license to the general public. Further, items that have evolved from such items and that are not yet available commercially are included within the definition of commercial items. 41 U.S.C. § 403(12). The definition of commercial item, therefore, can include items without histories of actual commercial sales.

common use items from the schedules and avoid using cumbersome and administratively costly traditional procurement procedures.

Contracts under the MAS program are negotiated most often under the catalog or market price exception to TINA. Offerors of common use, commercial items submit catalogs or pricelists reflecting the prices at which the offeror sells the offered item to commercial customers. Offerors are further required to submit sales information substantiating that the offeror has sold the offered item in the commercial marketplace at the catalog price represented. Offerors also submit information on discounts and other concessions granted by offerors to their commercial customers. As required by regulations, Government contracting officials use this information to conduct a price reasonableness analysis and to then negotiate a price based on volume discounts from the pricelists or catalogs submitted by the offeror reflecting the Government's expected purchasing volume. Thus, in the context of catalog-excepted procurements, the requirement for submission of commercial sales information and the regulatory requirement that a price analysis be performed assure that the Government will receive a fair and reasonable price on the offered item.

We believe that by amending TINA, H.R. 1670 will handicap GSA contracting officials' negotiating ability and lead to an increase in MAS prices. First, as noted above, H.R. 1670 would bring all MAS procurements within the new commercial items exception by eliminating the statutory language of the catalog exception, which currently requires not merely that an offered item meet the broad definition of "commercial item," but that the price agreed on for offered items be based on an **established catalog or market price of commercial items that are sold in substantial quantities to the general public.** We feel that the language of the existing exception adds a threshold price reasonableness assurance by providing that offered items have actual commercial sales histories and have prices that have been tested by competitive forces in the commercial marketplace. We strongly recommend preserving the catalog exception.

Second, as previously discussed, H.R. 1670 would delete the statutory language that currently provides affirmative authority for procuring activity heads to require other price reasonableness information, such as sales data and marketing information in the context of MAS procurements, and substitute a provision, under proposed subheading newly titled "Limitations on other information," which would restrict by regulation the types of information a contracting officer can obtain in excepted procurements, including MAS procurements. Although it appears by implication that contracting officers would continue to have the regulatory authority to conduct price reasonableness analyses, the changes proposed by H.R. 1670 would certainly deemphasize the importance of conducting such analyses.

Third, H.R. 1670 would apply limitations on sales data and the form of requested information to the negotiation of all procurements of "commercial items", rather than just the smaller category of procurements that currently fall within TINA's commercial items exception because they do not qualify initially as excepted under the adequate price competition, catalog, or prices set by law or regulation exceptions. We recognize that these limitations, such as the limitation restricting requests for sales data to only reasonable requests, are fairly general in nature and will be interpreted in implementing regulations.

Finally, as noted above, H.R. 1670 would eliminate the current TINA provision at 41 U.S.C. 254b(d)(2)(C) which allows contracting officers to require the submission of cost or pricing data on commercial items procurements when adequate price reasonableness information is not available. GSA on occasion requires the submission of cost or pricing information on offers for MAS contracts because an offeror cannot demonstrate that substantial quantities of the item have been sold to the public. With the changes proposed by H.R. 1670, GSA would apparently be left without statutory authority to require cost or pricing data on MAS items which have no actual commercial sales histories and for which no adequate price reasonableness analysis can be conducted.

We oppose H.R. 1670 because we believe that by removing the assurances of price reasonableness enumerated above, H.R. 1670, if enacted, would result in higher MAS product prices. We appreciate the opportunity to provide our views to the Committee and would be happy to meet with the Committee staff to discuss any aspect of our comments.

Sincerely,



William R. Barton
Inspector General

Attachments

cc: The Honorable William F. Clinger, Jr., United States House of Representatives
The Honorable Carolyn B. Maloney, United States House of Representatives
The Honorable Jan Meyers, United States House of Representatives
The Honorable Steven Kelman, Administrator, Office of Federal Procurement Policy, Office of Management and Budget
William R. Ratchford, Associate Administrator for Congressional and Intergovernmental Affairs, GSA



General Services Administration
Office of Inspector General
Washington, DC 20405



AUG 25 1995

MEMORANDUM FOR WILLIAM R. RATCHFORD
ASSOCIATE ADMINISTRATOR
OFFICE OF CONGRESSIONAL AND INTERGOVERNMENTAL
AFFAIRS (S)

FROM:

WILLIAM R. BARTON
INSPECTOR GENERAL (J)

SUBJECT:

Comments on Title VIII of H.R. 1530,
the Acquisition Policy Provisions of
the National Defense Authorization
Act

This memorandum transmits the comments of the GSA Office of Inspector General (OIG) on Title VIII of H.R. 1530, the National Defense Authorization Act (Act). The Act, as passed by the House of Representatives, contains amendments at Title VIII by Representatives Clinger and Collins that are similar in substance to H.R. 1670, the Federal Acquisition Reform Act of 1995, and H.R. 1795, the Federal Acquisition Improvement Reform Act. We note that we previously provided comments, on May 22, 1995 and June 20, 1995, to your office on each of these acquisition reform bills. We have significant concerns about the procurement provisions contained in Title VIII of H.R. 1530 and their impact on the procurement of commercial items in general, and the GSA's Multiple Award Schedule (MAS) program in particular. Our comments deal chiefly with the impact on MAS program prices of the provisions' amendment of the Truth in Negotiations Act to provide a blanket exemption from data submission requirements for all commercial items, and the new approval process established for all existing and future procurement related regulatory certifications.

Establishment of New TINA Commercial Items Exception

Section 811 of Title VIII would amend the Truth in Negotiations Act (TINA) to provide that the submission of certified cost or pricing data would not be required for a contract for the acquisition of a commercial item. Commercial items are broadly defined by current law to include items that are customarily used by the public and that have been sold, leased, or licensed to the general public, or that have been offered for sale, lease, or license to the general public. Items that have evolved from such commercial items but that are not yet available in the commercial marketplace also

qualify as commercial items. Thus, Section 811 would provide that, in many instances, the submission of cost or pricing data would not be required for items that have no history of actual sales in the commercial marketplace. Our office feels that, given the broad definition of commercial item, creating a blanket exemption from information submission requirements for the acquisition of commercial items is not prudent and may likely lead to inflated prices for such items.

Section 811's establishment of a blanket commercial items exception to TINA is apparently undergirded by the belief that the impact of the commercial market on the price of the item should be sufficient to assure that the Government receives reasonable pricing. We feel that this belief can only hold true in instances where offered items have actually been exposed to the forces of competition for sustained, sufficient amounts of time, given the nature of the market for the offered item. The Federal Acquisition Streamlining Act of 1994 (FASA), Pub. L. No. 103-355, defined commercial items to include both items without actual sales in the commercial market and items that have evolved from items without actual commercial sales. 41 U.S.C. § 403 (12). Therefore, if Title VIII is enacted, offerors of commercial items, including those commercial items without an actual sales record or that have evolved from items that do not have an actual sales record, will be exempt from the requirement to submit certified cost and pricing data. In such cases, the Government will have little assurance of price reasonableness for such products.

Our office is also particularly concerned with the effect on GSA's MAS program of the establishment by Section 811 of a blanket commercial items TINA exception. GSA's MAS contracts are negotiated currently under the TINA exception for offered items for which prices are based on established catalog or market prices. Section 811 would eliminate this exception. Therefore, MAS contracts, like other contracts for commercial items, would be negotiated under the proposed new blanket commercial items exception. To the extent that Section 811, together with other recent and pending regulatory and legislative procurement initiatives, discourage procurement officials from obtaining information, including price reasonableness information, we believe that replacing the catalog or market price exemption with a blanket TINA exception for all items that fit within the broad definition of a commercial item may lead to inflated MAS contract prices.¹

Our concern regarding the proposed new commercial items exception can be remedied in several ways. First, the definition of

¹The potential harm to the Government of negotiating inflated prices for MAS items because of less information disclosure is exacerbated by the fact that GSA's Federal Supply Service plans to extend the length of MAS contract terms significantly.

commercial item could be statutorily amended to include only items with histories of actual sales in the commercial marketplace. If this change were to be made, the proposed establishment by Section 811 of a blanket commercial items TINA exception would not be as objectionable. Additionally, a market price redetermination mechanism could be required by statute or regulation to be included in commercial items contracts negotiated under this blanket commercial items exception. Finally, TINA could be further revised to affirmatively provide that, for contracts negotiated under the proposed new blanket commercial items TINA exception, contracting officials could request price reasonableness information.

Establishment of New Approval Procedure for Procurement Related Certifications

Section 829 of the bill would eliminate certain statutory certifications and would require that all certifications contained in the FAR or agency supplements that are not specifically required by statute be eliminated unless either the FAR Council or the agency head of the promulgating agency justifies their existence in writing and the OFPP Administrator agrees. Initially, we believe that certifications are useful and benefit both the Government and contractors because they protect the Government while simultaneously reducing potentially burdensome paperwork submission and verification requirements that would be imposed on offerors if the Government were not able to rely on certifications to support information disclosures. Additionally, we believe that certifications can and do add value to the procurement process by increasing the reliability of pricing and other information provided by offerors in connection with procurements which, in turn, allows the Government to negotiate more favorable prices. Certifications likely also have a deterrent effect by providing notice to contractors that the Government relies on the accuracy of information provided and by allowing the Government to more efficiently and effectively prosecute, where warranted, procurement related fraud.

We also point out that the Government requires certifications in different contexts, ranging from assurances regarding the accuracy of pricing information for negotiation purposes to quality assurance or testing certifications. The bill would ostensibly subject all regulatory procurement certifications, in a wholesale fashion, to its new approval procedures.

For these reasons, we do not support the bill's elimination of statutory certifications and the establishment of a new centralized procedure to approve existing and future regulatory certifications. We believe the discretion to include certifications should be vested in particular agency heads who are in the best position to determine what certifications are necessary to protect the Government's interest in the context of specific procurement programs.

We feel that Title VIII of this bill, with its creation of a blanket TINA exception for all items defined as commercial items, whether or not the item's price has truly been subjected to competitive marketplace forces, and its disfavor of procurement related regulatory certifications, may have a negative effect on the prices at which the Government buys MAS items and other commercial items. Further, we believe that these provisions are reflective of the general misconception that protections such as information disclosure requirements, certifications, and audit rights are unique to contracting with the Government. As documented in our recent report entitled "Procurement Reform and the MAS Program: Safeguarding the Taxpayer's Interests," such protective mechanisms are commonly included in contracts between commercial buyers and sellers in the commercial marketplace and serve to ensure that the Government receives fair and reasonable prices.

If you have any further questions or wish to discuss any comment in more detail, please feel free to call Kathleen S. Tighe or Antigone Potamianos of our Counsel's Office on (202) 501-1932.



DEPARTMENT OF VETERANS AFFAIRS
INSPECTOR GENERAL
WASHINGTON DC 20420

SEP 7 1995

The Honorable Cardiss Collins
Ranking Minority Member
Committee on Government
Reform and Oversight
House of Representatives
Washington, DC 20515-6143

Dear Congresswoman Collins:

At an August 30, 1995 meeting to discuss procurement reform, a member of your staff requested that I provide you with my views concerning H.R. 1670, "The Federal Acquisition Reform Act of 1995." While I continue to support the Committee's efforts to reform Government procurement laws, I believe H.R. 1670 goes too far in eliminating essential safeguards built into the current procurement system.

The basic safeguards that I am referring to are: (1) disclosure requirements, (2) certifications, (3) price reduction requirements, and (4) audit rights. While I do not want to sensationalize my opposition to throwing away these basic safeguards in the procurement system, I truly believe their elimination will give the commercial item contractors a "green light" to overcharge the Government. This will cost the taxpayers many millions of dollars as H.R. 1670 leaves the Government with no real mechanism to detect and recover these overcharges.

The DOD Deputy Inspector General recently testified before the House Committee on Small Business and stated in regards to these procurement safeguards: "if you believe you will generally receive a better price by eliminating the right to ask for cost and pricing data or the opportunity for auditors to look at contractor's records, then I have a bridge you will be interested in." I agree with the Deputy Inspector General's comments.

I would add that the elimination of sound internal and managerial controls in the procurement system simply invites contractors to overcharge the Government. If you ask to be cheated on these procurements, most assuredly some contractors will take advantage of the opportunity. Ironically, these same contractors and the Associations that lobby for them, have influenced Congress to do

The Honorable Cardiss Collins

away with the same types of safeguards that these contractors enter into with their preferred commercial customers.

These contractors and their lobbyists have sold the myth that Government operates in ways significantly different than industry; therefore, drastic change/reform is needed in the "non-business like" Government procurement system. The July 1995 report titled "Procurement Reform and the MAS Program" issued jointly by my office and the GSA Inspector General's office contains an excellent discussion of this subject complete with examples from industry that clearly show the existence of basic safeguards in industry's contracts with their preferred customers that industry would like eliminated from Government contracts. (A copy of this report has previously been provided to your office.) In an industry as competitive as the healthcare industry, in which the VA operates, once you deny the Government certain contract protections that are available to large commercial customers, the door is wide open for contractors to subsidize even lower prices to their best customers with profits obtained from inflated prices to the Government.

The supporters of H.R. 1670 would also argue that Government procurement internal control practices such as audit are too costly. The facts do not support this argument. A simple cost benefit analysis shows in the VA that hard dollar recoveries from audits exceed the costs of these audits by a factor of more than 10 to 1. The enclosure to this letter contains some examples of our recent successes in this area. In addition to those recoveries, my office is currently working on cases with potential recoveries totaling over \$57 million. A number of the larger cases are nearing settlement which will further improve my office's already favorable cost benefit ratio.

An increasingly higher number of our recoveries and potential recoveries stem from voluntary disclosures by contractors. Interestingly, this increase in voluntary disclosures coincided with a decision I made to focus a portion of my office's resources on identifying and recovering overcharges from contractors. While some might argue that these contractors are making voluntary refunds out of a new found sense of patriotism, I believe the "tough cop" role my office plays in this area is behind most of the voluntary disclosures. Does Congress really believe that if audit's role is eliminated, these voluntary disclosures will continue?

The Honorable Cardiss Collins


Furthermore, the Congress believes that marketplace forces for commercial items will ensure a fair and reasonable price to the Government. In theory this sounds good, but in the healthcare area this is not the practice.

In the healthcare area, almost no one pays the "catalog" price. The healthcare contractors sell their product to wholesalers and to commercial hospital buying groups and others using a series of chargebacks, rebates, free goods and other incentives. Our audits frequently find that although the Government is the largest customer, we are not told about lower prices, rebates, free goods and other incentives offered by the contractor to commercial customers. As a result, we get overcharged. In short, buying healthcare items is unlike buying some other commercial items such as computers where best prices are widely advertised and these prices can often be relied on when evaluating the reasonableness of a contractor's price. We would caution against the "one shoe fits all" approach to procurement reform.

I have always maintained that good procurement is hard work. By design, procurement officials must conform to a series of internal and managerial controls built into the system. I am concerned that the simplified approach to procurement that Congress is searching for in H.R. 1670 will not lead to better procurements and could end up costing the taxpayers millions more.

If you have any questions on my views on H.R. 1670 and the safeguards that I believe are essential in the procurement process, I would be pleased to discuss them with you or your staff.

Sincerely,



STEPHEN A. TRODDEN

Enclosure

cc: The Honorable Williams F. Clinger, Jr.
Chairman, Committee on Government
Reform and Oversight

ENCLOSURE

As reported in the two most recent VA Office of Inspector General Semiannual Reports to the Congress (April 1, 1994 through March 31, 1995), VA has recovered nearly \$24.7 million in contract overcharges identified through audits, investigations, and voluntary disclosures by contractors selling commercial products, specifically healthcare items. Some examples of settlements with these contractors follow.

- A pharmaceutical company made a voluntary disclosure (to the OIG) that it owed monies to VA as a result of overcharges on two Federal Supply Schedule (FSS) contracts. The company voluntarily adjusted its prospective FSS prices to grant VA the best prices given to any customer. The OIG concluded that the company owed \$3,536,605 (including interest) because one of the contracts was defectively priced, while no monies were due on the other contract. The company remitted \$3,536,605 to VA.
- A pharmaceutical company remitted \$2,260,304 to VA as a result of an OIG postaward audit covering \$17.8 million in FSS contract sales. A VA team (comprised of OIG, Acquisition and Materiel Management, and Office of General Counsel participants) negotiated the settlement with company officials.
- Based on an OIG postaward audit, a pharmaceutical company agreed to pay VA \$1,850,000, which represented overcharges on FSS sales of \$19.5 million. The settlement was negotiated by a VA team consisting of OIG, Acquisition and Materiel Management, and Office of General Counsel personnel.
- A pharmaceutical company remitted \$490,134 to VA for contract overcharges resulting from errors in calculating Federal Ceiling Prices under Public Law (P.L.) 102-585. The errors were detected during our review of P.L. prices. The company acknowledged the errors and promptly remitted the overcharges to VA. Also, as part of the Settlement Agreement, the company agreed to implement policies and procedures that would incorporate the necessary internal controls to correct the errors noted in our report.

- An FSS contractor, under contract with VA to supply chest drainage systems used in surgical procedures, paid \$675,000 in settlement of the Government's civil suit. The contractor had not disclosed the best discounts being offered to commercial customers; and, after the FSS contract was awarded, the contractor offered even more favorable discounts to its non-Government buyers but failed to disclose these better prices to the Government as required under the terms of the contract. During negotiations, VA had relied on the contractor's certification that it had provided "accurate, complete and current representations" as to prices, in particular, the discounts being offered non-Government customers.

Since the most recently issued Semiannual Report ending March 31, 1995, VA has recovered an additional \$4.5 million in contract overcharges. Potential dollar recoveries associated with ongoing work amount to \$57.5 million, with settlements with the following two contractors nearing completion:

- The Department of Justice, assisted by the VA OIG has reached a tentative settlement of \$10 million with a manufacturer of surgical instruments and related supplies. The Government's position is that the contract was defectively priced because the manufacturer (during contract negotiations) failed to provide the VA contracting officer with accurate, complete, and current pricing data. As a result, VA's contract was significantly overpriced.
- We are currently negotiating a settlement with a generic drug company to settle issues of defective pricing and price reductions. Our post-award of the 5-year contract indicates the company did not accurately disclose better discounts given to several of their most favored commercial customers. We are working with the Department of Justice on the settlement and, to date, the company has offered \$7.5 million to settle the case.

THE ACQUISITION REFORM WORKING GROUP

Aerospace Industries Association • American Defense Preparedness Association • American Electronics Association
 Contract Services Association • Electronic Industries Association • National Security Industrial Association
 Professional Services Council • Shipbuilders Council of America • U.S. Chamber of Commerce

August 3, 1995

The Honorable Jan Meyers
 Chairwoman
 Committee on Small Business
 U.S. House of Representatives
 2361 Rayburn House Office Building
 Washington, D.C. 20515

Dear Madam Chairwoman:

On behalf of the nine association Acquisition Reform Working Group (ARWG), we request that the enclosed statement be included for the record of your August 3 hearing on acquisition reform. The ARWG testimony was originally presented before the House National Security Committee on August 2. We hope it will be useful to you as your Committee reviews legislative initiatives related to reforming our Federal procurement system.

Thank you for allowing us to submit our statement for the record. We look forward to working with you.

Sincerely, .

Aerospace Industries Association
 American Defense Preparedness Association
 American Electronics Association
 Contract Services Association
 Electronic Industries Association
 National Security Industrial Association
 Professional Services Council
 Shipbuilders Council of America
 U.S. Chamber of Commerce

**Testimony of the Acquisition Reform Working Group
before the House National Security Committee
August 2, 1995**

Presented by

**Mr. Thomas Mulcahy
Chairman of the Board
Condor Systems, Inc.**

and

**Mr. Sam P. Iacobellis
Executive Vice President and
Deputy Vice Chairman-Major Programs (Retired)
Rockwell International Corporation**

Good morning, Mr. Chairman. Thank you for the invitation to testify on measures aimed at streamlining our government's cumbersome procurement system.

Today, we are pleased to testify on behalf of nine associations which have formed the "Acquisition Reform Working Group" (ARWG). These organizations are listed at the end of this statement (attachment A). Together, we represent tens of thousands of companies and individuals, the overwhelming majority of which are small businesses, as well as majority and minority-owned businesses, companies which do business with the Department of Defense only, with the civilian agencies only, and with both. We also have members of all sizes who refuse to do business with any federal agency, in part because of the very acquisition laws which are the focus of today's hearing.

We are pleased that this Committee has continued to be interested in pursuing acquisition reform since your efforts in the last Congress were critical to the successful passage of the Federal Acquisition Streamlining Act of 1994 (FASA). In particular, the Committee has asked us to address three elements: acquisition reform generally, including FASA implementation and industry initiatives for further reform; comments on H.R. 1670; and comments on other Executive Branch procurement initiatives.

I. ACQUISITION REFORM

FASA is the result of a four-year bipartisan effort (beginning with the Section 800 Panel review of Defense Department acquisition laws) to streamline and reform the existing costly and complex Federal procurement process. It is the most comprehensive

government-wide acquisition reform statute in over a decade. The principal objective of FASA is to strike a more equitable balance between the multitude of government-unique policy requirements imposed on Federal procurements and the need to lower the Federal Government's cost of doing business. The Act is a big step toward accomplishing this objective. It makes it easier for the government to acquire commercial goods and services and to use commercial practices; streamlines the rules and regulations for high-volume, low-value Federal procurements; and improves access by small business to Government contracting opportunities. The Act also seeks to achieve, in most cases, a uniform government-wide acquisition policy.

The government spends approximately \$200 billion a year for goods and services. This volume of expenditures evokes an understandable concern about ensuring that the interests of the taxpayer are protected. This, in turn, has led to redundant controls, certifications, etc., which unnecessarily complicate the process, which as numerous government and private sector studies have demonstrated, increases the cost of goods and services which the government buys. The result is a system overloaded with controls to guard against "fraud, waste and abuse" -- controls which shortchange the taxpayers because of the higher prices caused by non-value added costs. The government's and contractors' workforce are so challenged just to cope with the proliferation of regulations and procedures that there is little time or incentive to be innovative or to exercise judgement and there is little or no individual accountability. Indeed, under the current system where judgements are routinely second-guessed and challenged and often result in charges of criminal conduct, few responsible contracting officials are willing to exercise the flexibility they have at the risk of shortening their careers. This must be changed.

Two reviews -- the comprehensive Acquisition Law Advisory Panel on Streamlining and Codifying Defense Acquisition Laws (commonly referred to as the Section 800 Panel review) and the National Performance Review -- have documented the need to streamline procurement procedures to increase access and competition in Federal procurement, and save the government money. The studies also indicated that current trends of further burdening the system and the workforce must be reversed as the first step to instituting a cultural change in the acquisition workforce.

Both studies concluded that the procurement system has evolved into a complex maze of laws and regulations that makes the process too cumbersome and fails to provide sufficient incentives for suppliers to deliver quality products and services at reasonable prices, or to allow government personnel to exercise prudent discretion and good business judgement. Furthermore, the studies showed that the current system discourages companies -- especially commercial companies -- from wanting to do business with the government.

As we moved toward addressing the barriers to a streamlined process, however, we remained cognizant of the concerns over fraud, waste and abuse that created these barriers in the first place. FASA addressed the barriers to a streamlined, efficient purchasing and, at the same time, remained sensitive to those concerns.

FEDERAL ACQUISITION STREAMLINING ACT OF 1994

With the passage of the Federal Acquisition Streamlining Act of 1994, Congress took a significant step toward reforming the way in which the government procures goods and services. In particular, critical improvements were made in areas related to commercial item procurements, the Truth in Negotiations Act (TINA) requirements for cost and pricing data and the simplified acquisition threshold.

- Commercial items. The rules that make it almost impossible for a manufacturing facility to produce both military and non-federal products in the same factory without violating federal regulations, statutes and/or accounting rules are a major obstacle to doing business with the Defense Department. Facilitating the procurement of commercial products and services remains perhaps the single most important issue to be addressed in acquisition reform. It was a major focus of everyone.

FASA is based on the premise that the forces of the commercial marketplace can be relied upon as much by the government as they are by all of us when we spend our own money -- to ensure that product quality meets our requirements and that the prices and terms are fair and reasonable. The Act establishes a specific preference for procurements of commercial items. It also exempts such procurements from a number of statutory requirements, including several that currently are "flowed-down" to subcontractors.

- Truth in Negotiations Act (TINA). Past TINA requirements resulted in some of the more onerous burdens on industry due to the amount of financial information that a contractor is required to collect uniquely for the government. FASA permanently increases the threshold, government-wide, to \$500,000 (adjusted for inflation), below which certified cost or pricing data is not required. It also creates a possible exception for certain commercial item procurements.

- Simplified Acquisition Threshold (SAT). FASA raises the SAT threshold from \$25,000 to \$100,000 for agency use of simplified contracting procedures. Such procurements would be exempt from a number of statutory requirements. This simplified process is also available to contractors for subcontract purchases under \$100,000.

IMPLEMENTATION

ARWG recognizes that diligent oversight of FASA implementation is needed to ensure that the promises and opportunities envisioned in the law are not lost. We are pleased, therefore, that the Committee's report on the Fiscal Year 1996 defense authorization bill (H.R. 1530) addresses this critical issue of FASA implementation, and that other Committees have held hearings on this matter.

A word of explanation about the relationship between ARWG and the Council of Defense and Space Industry Associations (CODSIA). CODSIA is a multi-association entity formed in 1964 by industry trade associations having common interests in the defense and space fields. It is comprised of nine associations and represents approximately 4,000 large and small firms. The Department of Defense encouraged formation of this organization as a vehicle for obtaining broad industry input on new and revised regulations, policies and procedures concerning procurement issues.

The industries represented by CODSIA have a long history of working collectively on procurement issues as they relate to the regulatory process. CODSIA by its charter is prohibited from lobbying Congress. Therefore, while CODSIA was very active in providing comments to the DOD Advisory Panel on Codifying and Streamlining Acquisition Law (commonly referred to as the Section 800 Panel), CODSIA did not lobby Congress on the resulting legislative proposals incorporated into FASA.

In the spirit of cooperation, these same associations, largely made up of CODSIA associations, came together to form the ad-hoc Acquisition Reform Working Group (ARWG). ARWG has become a recognized multi-association entity focusing exclusively on providing industry comments on legislative acquisition reform initiatives. It is anticipated that coordinated industry comments and recommendations on legislative acquisition reform initiatives would be provided by ARWG and comments on regulatory implementation of acquisition policy matters would be provided by CODSIA.

CODSIA has expressed great concern with the quality of many of the draft implementing regulations to date and believes that in many areas they fall short of the congressional intent to streamline the acquisition process. ARWG, too, believes that the draft implementing regulations fall short of the congressional intent to streamline the process. Therefore, we have provided for the record a summary of the comments that CODSIA has provided to the Administration on their draft FASA regulations.

• FASA regulatory implementation strategy. The enactment of FASA created a major challenge for the FAR Council to draft comprehensive, government-wide, procurement rules which would carry out both the spirit and intent of FASA. The FAR Council responded

to this challenge by establishing government-wide drafting teams which were instructed to review the new law and draft regulations taking a "clean sheet of paper" approach. Upon arriving at some consensus within the drafting team, the draft regulation was issued for public comment. Several innovative procedures were employed:

- 1) Any commentor, government or industry, could request a public meeting on the draft rule;
- 2) The public meeting was attended by members of the FAR Board of Directors and the drafting team;
- 3) The public meeting encouraged discussions and facilitated greater government/industry exchange of ideas; and
- 4) The draft rule was published again for final review and comment.

The implementation process, which includes two-60 day public comment periods, is moving along at a pace which could still meet the statutory deadline of 330 days.

While the process is still ongoing, we encourage the FAR Council to review the procedures employed in the FASA regulation implementation process with all the stakeholders to assess what worked and what did not work. The stakeholders would include: drafting team members; industry representatives from both large and small business interests; congressional staff; contracting officers; and the FAR Board of Directors.

ARWG KEY ISSUES

Continuing the push for acquisition reform remains an issue of central importance to the Congressional goal of achieving a more efficient government and getting more from budget dollars. It is of central importance to industry also. The degree to which the government is able to expand its sources of supply to acquire better quality and less costly goods and services (e.g. by removing costly non-value added requirements) clearly will be a benefit to the American taxpayer and a step toward greater efficiencies in the government buying process.

ARWG firmly believes that further legislation is necessary to fully effect the fundamental reforms needed to ensure the efficient and effective conduct of Federal Government contracting.

The ARWG recommendations encompass four broad categories:

(1) Additional streamlining and simplification measures.

These include:

- contract close-out streamlining
- certification elimination
- elimination of non-standard clauses
- simplified solicitation

Each of these issues applies across the entire range of government procurement actions. Contracting problems are faced by all companies because of the high risk investment currently associated with defense contracting in particular. While an "average" contract generally doesn't get the attention that a major weapons system does, the non-value added cost on each individual contract in terms of extra paperwork, cost-of-money and inefficiency totals up annually to many millions of dollars in taxpayer money.

- For example, action is needed to ensure sufficient monies to streamline contract closeout without having to shift funds from current programs and also to prohibit non-value added paperwork and oversight steps. When a contractor completes performance on a contract for the government, the final payments due the contractor are withheld by the government until the government can audit the contractor's billings and negotiate final payment rates. Typically, this process takes four or five years and, very often, as many as seven or eight years. One member company waited 12 years for its final payment -- not because there was any dispute over the funds but because the government just didn't get around to completing the audit. Fortunately, administrative actions to address this issue have been taken recently and will be discussed later in the testimony.

- Legislative action is needed to eliminate the statutory and regulatory contractor/offeree certification requirements, most of which are not really necessary to ensure the lowest price for a quality product. Certifications generally are a way of providing contracting personnel with a "comfort factor," or a double-check on information that is otherwise available, but these certifications potentially subject contractors to severe criminal and civil penalties for inadvertent misstatements.

- Another problem for businesses is the compounding of regulation upon regulation. For example, Congress may pass a law which requires the development of a new acquisition regulation or policy by the Office of Federal Procurement Policy. After this is issued, each service or agency develops a rule or regulation which is its interpretation of the federal policy. Their subordinate commands do the same. These agency supplements to the FAR enable the agencies to impose unique requirements on the private sector. Elimination of these agency supplements would be a major improvement for contractors; we believe government contracting officers would also welcome this change.

- Another contract related problem is what could best be called lapses in the contracting cycle. When a company is providing a product or service, the work is such that it could span more than one fiscal year and is incrementally funded or

takes the form of a basic ordering agreement with multiple tasks. Because of the flow of money and the delays in the processing of contracts, there are gaps of weeks or months between the end of one task and the beginning of the new one. Even though we know there is going to be follow-on work, and that the money is available and contract instruments are in process, we cannot start work. For small businesses, they cannot afford to carry individuals on overhead and often must lay people off. This is highly disruptive to companies and to the customer, and does not keep a team together for the project. One solution appears to be fairly simple -- require contracting officers to fully utilize the Advance Agreements part of the Federal Acquisition Regulation. This clause allows the contracting officers to authorize precontract costs for work that is going to be performed. The problem is, almost no contracting officer uses this clause because of reluctance on the part of higher echelon commanders to authorize its use. The proper application of this clause could solve many contracting problems, especially for small businesses. While this issue is mainly administrative in nature, it exemplifies the "culture" that will be difficult to change. Congress can facilitate culture change by legislation such as FASA, and even more so by not overreacting every time a contracting officer or contractor makes a judgement with which it does not agree.

(2) Global and international related measures. Included in this area is the elimination of the statutory vestiges of recoupment of non-recurring cost. In the highly competitive global marketplace, recoupment often can mean a 20-30 percent competitive disadvantage to U.S. companies. With such a disadvantage, U.S. companies can lose sales opportunities which results in a loss of U.S. jobs, less U.S. defense capability and, with reduced volume due to the loss of sales, a higher cost to U.S. taxpayers for defense products. The Administration supports the repeal of recoupment.

(3) Additional commercial items procurement measures. We believe that no government-unique terms and conditions should apply to purchases of commercial products. When the government acts as a player in a larger commercial marketplace, it enjoys the same protection as other buyers and needs no unique protection. Competition ensures that the prices and terms are fair and reasonable, and that product quality meets contract requirements.

The Congress enacted many significant commercial product reforms in FASA. While FASA was a first good step in simplifying the process, further reforms are needed to simplify a process still laden with laws, regulations, procedures, forms, bureaucracy and culture which prevent the government from raising its purchasing system to a world-class

standard. Doing business the "government way" creates an artificial distinction between commercial and government sales, keeps commercial companies out of government sales, and needlessly wastes taxpayers money on non-value added government-unique provisions, certifications, and audits. There are three areas we believe must still be addressed in any acquisition reform measure:

- A comprehensive list of statutory exemptions for commercial prime contracts.

The benefits that could be gained by purchasing a commercial product are greatly reduced with the introduction of only a few government-unique terms and conditions. A commercial item purchased by the government cannot, as a practical matter, be treated differently than items purchased by commercial customers.

To accommodate these government-unique terms and conditions, new systems must be established, causing increases in costs and delayed schedules -- and the company becomes less competitive as a result. Piecemeal commercial products reform simply will not reap the cost savings and efficiencies the government needs in this critical budget environment. Indeed, attempting to specifically waive individual elements of existing legislation to remove all barriers to the integration of the commercial and defense sectors is a hit or miss process. ARWG, therefore, recommends a more global approach that would expressly supersede any other provision of law and would require the acquisition of commercial items in accordance with commercial terms, conditions, practices and specifications at the manufacturer's commercial prices. Commercial companies would still be required to comply with all of the laws that apply to U.S. businesses, such as equal employment opportunity, minimum wage requirements, and Securities and Exchange Commission regulations.

If waivers cannot be addressed on this global basis, additional prime contract barriers such as rights in technical data, cargo preferences and Buy American/Trade Agreements provisions, must be exempted.

Also, ARWG would like to emphasize the need for statutory relief rather than simple waiver authority for the executive branch. We have found that where waiver authority has been available to the Defense Department, for example, the department has been reluctant to use it, particularly when the procuring activity is required to elevate approval to the Agency Head or above. It can take years to secure waiver approval.

- ARWG recommends a clear, unambiguous TINA exemption. Industry found that the FASA proposed regulations create different treatments for qualifying commercial items depending on the exception. (FASA created a "new exception" for commercial items and a "catalog and market price" exception for commercial items already existing in TINA.)

- Elimination of post-award audits for commercial product procurements. FASA grants the government post-award audits for two years after award of a commercial contract. We believe that a competitive price for a commercial item can be established by market research techniques, surveys and the like. When this information is not available, the vendor can support the price of the commercial item through other objective evidence, such as customer orders and invoices and purchasing agreements with other customers. We believe the government, therefore, can adequately determine price reasonableness prior to reaching an agreement on the price of a commercial product. We want to make clear, however, that if a company commits fraud, the government should, and will, have full rights to impose the penalties under current commercial commerce law. Fraud simply cannot be tolerated in any marketplace.

(4) Small business and other items. ARWG supports programs that encourage and assist small businesses (including small disadvantaged and women-owned businesses) to obtain a "fair share" of federal procurement opportunities. Small businesses and small disadvantaged businesses are important sources of supply to the Government. Yet, small business disproportionately feels the loss of business revenue and the unique burdens placed on Government suppliers. These businesses can least of all afford to bear the additional overhead costs (including the hiring of additional employees or lawyers to ensure compliance) associated with doing business with the Government.

FASA included many significant benefits and protections for small businesses in federal contracting. ARWG believes that more can be done by making permanent the Defense Department's pilot mentor protege program and extending it to all government agencies; by expanding the Defense Department's comprehensive subcontracting test program; and by providing clearer authority to civilian agencies for their own subcontracting programs.

In addition, legislation should be enacted that authorizes sales by the Defense Department of low dollar value plant equipment to incumbent contractors.

Attached is list of the individual items which fall into these broad categories (attachment B). A copy of the complete ARWG

package has already been submitted to the Committee. This package, however, does not encompass all of the issues that industry is pursuing. Indeed, there are several coalitions working on additional legislative proposals which ARWG will support.

Now is the time to enact additional acquisition reform initiatives that will bring us even closer to the streamlining goals we all share.

II. THE FEDERAL ACQUISITION REFORM ACT OF 1995 (H.R. 1670)

Turning to the bill introduced by Chairman Floyd Spence and Chairman Bill Clinger (House Government Reform and Oversight Committee), the Federal Acquisition Reform Act of 1995 (H.R. 1670) is a vehicle for further Congressional action on acquisition reform. ARWG is strongly supportive of many provisions in this legislation -- those provisions alone push the envelope of acquisition reform further than ever before. Other areas have promise, but may need further refinements to achieve your articulated intentions. The bill went through one set of changes when added as an amendment to the Defense Authorization bill (H.R. 1530) in June, and again last week in the Government Reform and Oversight Committee.

Outlined below are our comments on key elements in H.R. 1670.

ARWG Principles on HR 1670

Among the more difficult tasks is looking at specific legislative proposals and determining whether to recommend to the various associations and to their member companies to support or oppose specific provisions. Since HR 1670 was approved in final form by the Government Reform and Oversight Committee only last Thursday, it has been impossible to fully analyze the 148 pages of amendments to existing procurement laws in order for the associations to reach a final conclusion on the legislation.

ARWG has been given the opportunity to discuss with members and staffs of the Government Reform and Oversight Committee and the National Security Committee their intent in putting forward this legislation. We have also seen several drafts of various amended sections of the legislation. We very much appreciate the opportunity we have already had to work with the committees and your staffs to understand the policy direction you seek for the legislation, to provide our assessment of the impact of the proposed changes on the current system, and to offer our suggestions. We believe that process has benefitted both sides. In light of these exchanges, we believe we can continue to provide your committee with meaningful comments on the legislation.

Several ARWG associations and member companies have looked carefully at versions of HR 1670 that predate the Clinger substitute amendment approved by the Government Reform and Oversight Committee on July 27 and concluded that the specific texts did not appear to implement the sponsors' expressed intent. We hope that this Committee, and the Government Reform and Oversight Committee, will continue to refine the text to make the sponsor's intent explicit.

Competition (Title I)

Title I of HR 1670 as approved by the House Government Reform and Oversight Committee amends several key provisions of current law -- basically, the provisions of the Competition in Contracting Act and related provisions that were incorporated into dual conforming statutes for Defense and for the civilian agencies in 1984, and for government-wide applicability in the Office of Federal Procurement Policy Act in 1988.

As we noted in our June 21, 1995 letter to Chairman Clinger and other members of the House, ARWG continues to support the concept of providing government agencies with the option of conducting procurements utilizing something less than "full and open competition," as traditionally defined, while still maintaining the key attributes of full and open competition. A copy of the ARWG proposed competition process is attached (attachment C).

Our purpose in developing this proposal is to outline a process which at the outset maintains the intent of full and open access to bidding and contracting opportunities. At the same time, the initiative reflects the need for the government to conduct competitions in the most efficient and effective manner and, in doing so provide, potential bidders and contractors with information on their qualifications at the earliest opportunity.

ARWG members all agree that it is a waste of time and valuable resources to compete for federal procurements in which they have no viable chance of winning. Competition in the federal marketplace should be aggressively pursued, but when a contractor may not be in a viable position to win a contract award that contractor needs to be told promptly, be given a thorough debriefing and allowed to decide whether to pursue the procurement.

ARWG has supported a process which includes a "pre-offer" phase in which the agencies would be required to provide a clear and sufficient notice of their intent to issue a solicitation. The notice should include a reasonably detailed synopsis of requirements as well as the criteria on which both an early narrowing of the competitive range and the final source selection determinations will be based. The notice could also specify that the agency will require brief statements of interest/

qualifications from firms wishing to participate in the solicitation. The notice must also include an announcement of any agency intent to seek to limit the competitive range in the post-offer phase, and the criteria on which such a down-select decision will be made.

There are numerous examples under current law in which the Congress, and the procurement community, have recognized legitimate circumstances when procurements using procedures "other than full and open" competition.

For example, current law clearly allows agencies, under specific procedures, to restrict competition to bidders who have "prequalified" to meet legitimate agency requirements. In addition, last year, as part of the Federal Acquisition Streamlining Act (FASA), Congress enacted the simplified acquisition threshold of \$100,000 and provided that procurements below that threshold must generally be reserved exclusively for small business.

The legislation provides for a pre-award debriefing, and the information gained from the debriefing could provide the basis of a protest. ARWG shares the committees' intent that all offerors who are excluded from the competitive range are entitled to a debriefing from the agency regarding the basis of the agency's decision. The timing is the key issue dividing us; to be effective, we believe all who are excluded from the competitive range must be debriefed at the time the down-select decision is made, unless there are reasons clearly spelled out in advance in the regulations.

With respect to the verification provisions of the legislation, we have had a number of discussions with staff about our concerns with changes from the current system. Although we have not completed an analysis of the Government Reform and Oversight Committee's proposal in this area, we believe our major concerns have been addressed in the legislation.

On a closely related matter in Title I, we have repeatedly expressed concerns about the significant delegation of authority to the Executive Branch to write regulations to define the procurement system that is to result from the enactment of this legislation. Unlike FASA, which last year delegated authority to the Executive Branch to remove barriers that stood in the way of expanding the current acquisition system, we believe this legislation delegates authority to the Executive Branch to write, and then implement, the basic rules of a new acquisition system. As we noted in our discussion of the still-in-progress regulatory implementation of FASA, the ARWG/CODSIA organizations still have a significant number of concerns with the rules and with the rulemaking process. Our experiences over the past several months have led to our skepticism about the responsibilities given the Executive Branch under this legislation. This concern is further exacerbated by the provisions

in title I which grant the Executive Branch broad powers to write virtually unlimited regulatory exemptions from the "open access" provisions of law.

Commercial Items (Title II)

ARWG applauds Chairmen Spence and Clinger for their efforts to make further reforms in the area of commercial items. The introduced version of H.R. 1670 on commercial items is a solid legislative proposal that significantly advanced the initiatives that Congress began more than five years ago and refined substantially in FASA.

The bill favorably addresses critical issues in the area of cost or pricing data, post-award audits and cost accounting standards. We fully expect that these proposed changes will enhance the government's ability to buy off-the-shelf goods and services and encourage commercial companies to enter the federal marketplace. The changes also will have a positive impact on industry, including small businesses.

We support the bill's action to help eliminate several statutory and regulatory certifications, most of which are not necessary to ensure the government that it is receiving fair and reasonable prices for quality products. We suggest broad language be used which prohibits statutory certifications from applying to commercial items except as set forth in this bill.

In the area of the Truth in Negotiations Act (TINA), ARWG strongly supports the provisions fully exempting commercial items from TINA, and eliminating post-award audits for commercial items. ARWG argued during the debate on FASA that a clear exemption from TINA for commercial items was needed to simplify this complex requirement. Implementation of the TINA regulations has proven that it is difficult for the regulations writers to understand how the various statutory exemptions from TINA apply to commercial items and how they interact with each other. Also, in our view, FASA failed to help simplify commercial item acquisition when it included a two-year post-award audit provision. H.R. 1670 correctly eliminates this provision. In testimony given earlier this year on procurement reform before the Government Reform and Oversight Committee on February 28, 1995, the General Accounting Office (GAO) also supports fully exempting commercial items from TINA and deleting the FASA imposed post-award audit provision.

While FASA was a step forward in simplifying the acquisition of commercial items and may appear as substantial movement in acquiring commercial items, ARWG believes that its effects will not be as great as expected without further statutory changes to eliminate non-value added government-unique clauses from the acquisition of commercial items. FASA eliminated certain statutes to commercial item acquisition and allowed the Executive Branch to

identify additional statutes to exempt at the subcontractor level. It failed, however, to eliminate a number of government-unique provisions which result in requirements and burdens that are at cross purposes with commercial businesses competing in a global environment.

ARWG believes that no government-unique terms and conditions should apply to purchases of commercial items. When the government acts as a player in a larger commercial marketplace, it enjoys the same protection as other buyers and needs no unique protection. Competition ensures fair and reasonable prices, and that product quality meets contract requirements. We believe that H.R. 1670 should provide that no other statutory acquisition requirements are mandatory for the acquisition of commercial items except as specifically identified in this bill, and that any post-enacted statutory requirements otherwise applicable to acquisitions by the government shall be inapplicable to acquisition of commercial items except to the extent that such law expressly states otherwise.

While some changes may have to be made to accommodate legitimate concerns that have been raised by some of the agency oversight activities, any amendment that would simply cap the use of simplified acquisition procedures for commercial items at \$100,000 would make virtually no change to current law.

Government Reliance on the Private Sector (Title III)

Driven by severe budgetary pressures, cities, counties and states across the nation are rapidly turning to the private sector to provide services of every conceivable kind, recognizing as they do that the outsourcing of government services saves money and often improves the quality of services. These governments also have recognized that there are scores of functions performed by government personnel that government simply doesn't need to perform and that the private sector could provide efficiently. Since we know that growing jobs in the private sector is the key to our nation's economic well being, it only follows that a course of aggressive outsourcing serves the interests of the government and its taxpayers.

The Office of Management and Budget (OMB) estimates that there are as many as 500,000 federal positions that could be contracted out. OMB studies and others have shown that for each federal position converted to the private sector, the government saves an estimated \$10,000 annually. Thus, it is easy to see how an aggressive outsourcing initiative could result in cost savings of billions of dollars annually.

ARWG, therefore, applauds this bill for its strong statement in support of reliance on the private sector for goods and services needed in the government. For the first time in our history, you have placed in statute an explicit policy to rely on the nation's

private sector. There can be no question that the development of capabilities in the private sector, rather than the public sector, is in the nation's best interest. As the resources of the government decrease, this is a fitting time to assure that the government is operating in its proper role and utilizing existing private sector resources for non-governmental functions.

ARWG strongly supports this provision and hopes to work with the Committee to develop follow-on legislation to establish necessary enforcement mechanisms to ensure that this reliance on the private sector is fully embraced by all agencies.

While we applaud this statutory statement, we must remind the Committee that we need to grapple with the linchpin issues of public-private competitions and the validity and fairness of the current cost-comparison process. By any measure, the current process fails to adequately account for government costs, and skews the selection away from the private sector. As a side note, ARWG commends this Committee for tackling the issues of privatization within the Department of Defense by repealing the 60/40 rule, effective December 31, 1996.

Elimination of Certain Certification Requirements (Title III)

ARWG whole-heartedly endorses this provision as a benchmark for elimination of non-value added administrative burdens. This section adopts the essence of the ARWG recommendation to statutorily prohibit the regulatory implementation of unnecessarily burdensome non-statutory certifications. While maintaining the integrity of compliance requirements, the bill also repeals four statutory certifications pertaining to requests for equitable adjustments, contractor inventory control systems, payments to influence federal transactions, and the Drug Free Workplace Act.

ARWG believes that additional statutory certifications could be eliminated. We have already provided the committee with an updated list of certifications currently required by statute or regulation.

International Competitiveness (Title III)

In the area of global and international measures, we are pleased to see the long called for provision to repeal the recoupment of non-recurring costs -- this is a key ARWG recommendation. In the highly competitive global marketplace, recoupment often can mean a 20-30 percent competitive disadvantage to U.S. companies. The repeal of this statutory requirement will greatly enhance the competitive capability of international defense manufacturers.

Recoupment charges raise the price of U.S. products. While these charges may have made sense during the Cold War era when the

U.S. dominated the world defense market, today there are competitors for most products that the U.S. is willing to allow its contractors to sell overseas. The U.S. taxpayer and the Department of Defense will benefit significantly from an export sale of defense equipment, including increased employment and tax revenues and decreased unit costs for the same equipment being purchased by the U.S. government. If a sale is lost because of the higher price effects resulting from recoupment charges, then none of these benefits is realized.

Procurement Integrity (Title III)

In FASA, the Congress acknowledged the plethora of overlapping, redundant and conflicting laws on the subject of ethics and integrity in government contracting and the employment limitations associated with conflicts-of-interest in this area. This was a good beginning, but there remains much more that can and should be done in order to let people perform their jobs in an efficient and value-added manner without having to spend time on non-value added certifications, training sessions, and self-protective actions and documentation.

ARWG fully supports initiatives both within the government and industry to enhance the ethical and efficient functioning of the acquisition process. Over the years, however, too many overlapping statutes have been enacted, aimed at preventing the same kinds of abuse but with different restrictions. Enactment of the changes in H.R. 1670 will go a long way toward achieving a truly streamlined reform in ethics and conflict of interest statutes and redundant post employment laws. ARWG supports the provisions repealing onerous reporting requirements and duplicative conflict of interest statutes and replacing them with broad protections for source selection and proprietary information.

H.R. 1670 would promote understandable government-wide standards that are not only rigorous, but readily understood and enforceable. Replacing the existing patchwork of complex, overlapping rules with a simpler, less burdensome structure is long overdue. The result of these changes is certain to be a movement toward more healthy, open and substantively-based communications between the buyer and seller, which has been unduly inhibited in recent years.

ARWG is aware that the version of Procurement Integrity legislation in H.R. 1670, as marked up the Government Reform and Oversight Committee, and in the House passed FY 96 defense authorization bill (H.R. 1530), differs from the version that was initially included in H.R. 1670. The initial version of H.R. 1670 provides the strongest protections for the government's interests while preserving the rights of U.S. citizens, whether they be employed by the government or by a private contractor, to be considered innocent until proven guilty of wrongdoing.

The changes which have been made to this portion of the bill delete some key protections for individual citizens. Specifically, the standard for a violation has been changed from "knowingly and willfully" to "knowingly;" maximum imprisonment has been increased from five years to 15 years; and the standard of proof has been changed from the more rigorous "clear and convincing evidence" to the "preponderance of the evidence" standard. ARWG believes that these changes are inappropriate and unjustified. We endorse only the original version of the bill in these respects.

Penalties of up to 15 years in prison are excessive for an information protection law. Currently, 15-year prison sentences are reserved for such crimes as armed robbery and wrongful distribution of amphetamines; a five-year maximum sentence is available for such crimes as making false official statements and obstructing justice, which are much more comparable to a procurement integrity violation.

Bid Protest and Contract Disputes (Title IV)

One of the areas of heightened attention is the proper role for, and access to, protests. Protests are an unfortunate, but very necessary part of the federal acquisition system. In and of themselves, they serve as a valuable check on the actions of government to ensure that the system is fair, open and consistently applied to all. In our view, it is not a question of whether there needs to be a protest system in the federal acquisition system, but rather what protest mechanisms are the most effective. It is critical to recognize that the protest provisions of current law and regulations are only a part (and a very small part) of the entire federal acquisition system. Rather than looking at protests as a stand alone matter, we must look more deeply into the earlier in time requirements development and contract formation processes to identify root causes for why protests are filed. Bid protests are only one part of the broader procurement process and with improvements of the acquisition system will come a reduced use of the protest system. Yet the protest process now in place can still be made more efficient.

ARWG strongly endorses the use of alternative dispute resolution mechanisms and the establishment of sanctions for frivolous protests. ARWG has provided committee staff with an alternative that builds on the language in H.R. 1670. This alternative focuses on a four-phase approach (see attachment D) which includes: (1) prompt and detailed debriefings (as called for in FASA); (2) objective, senior-level agency review; (3) board-supervised alternative disputes resolution (ADR) process; and (4) board-conducted quasi judicial process.

Title IV of H.R. 1670 addresses the streamlining of the disputes resolution process. This is a subject of vital interest to all parties involved in the acquisition process. In the

interest of economy and efficiency, streamlining of the current process is both timely and appropriate. However, expediency should not be accomplished at the expense of fairness. Needlessly adversarial and procedurally-encumbered adjudicating procedures which waste the resources of all parties, and disrupts the acquisition process - particularly source selections - due to trivial, nonprejudicial error, are a luxury the process can no longer bear.

ARWG believes that the legal and proceedings costs of protests are a reasonable and necessary business expense, but such costs should not be reimbursable under government contracts when the protest in issue is either frivolous or has been pursued in bad faith. Moreover, the costs incurred by a prevailing protestor in preparing and submitting a proposal to the government should be reimbursed when the adjudicating forum determines that the government had acted arbitrarily, capriciously or contrary to law or regulation, resulting in substantial and prejudicial harm to the protester. Title IV appears to adopt this view, but does not address arbitrary or capricious action as a basis for such redress.

There is a rebuttable presumption that the challenged government actions were not arbitrary, capricious, or in violation of law or regulation, as reflected in Title IV. Title IV does properly provide an opportunity, albeit limited within the discretion of the adjudicating forum "to the extent consistent with economy, efficiency, and fairness," to go beyond the agency written record by means of appropriate discovery.

We support the formulation in Title IV that does not deny offerors and bidders access to the bid protest process merely because the procurement at hand is under the threshold for simplified acquisitions or is a procurement for a commercial product or service. To have done otherwise would unfairly disenfranchise a universe of predominantly small and small disadvantaged business concerns. Offsetting this, in the interest of efficiency and economy, is provision for simplified rules in the case of procurements of \$20,000,000 or less. While ARWG endorses simplified procedures for smaller dollar valued actions, we have adopted a position that the specific threshold for access to the full board procedures should be set much lower.

Title IV provides in appropriate circumstances for suspension of awards, suspension of contract performance, and continuation of the procurement process short of contract award in the face of a protest. However, and most importantly, it provides for an agency override under certain circumstances when there is an appropriate agency head determination and notice. The Acquisition Reform Working Group believes these provisions to be consistent with the interests of all parties and, at the same time, protective of the rights of the protester and the apparent successful offeror or bidder. However, we are concerned that the authority of the

government to proceed with award or to continue contract performance not serve as the basis to deny the prevailing protester a fair and proper remedy because of the intervening costs incurred by the government.

In the case of a frivolous protest, the authority to hold the protester accountable to the government for expenses incurred should be limited to those expenses deemed to be "reasonable."

ARWG supports the provisions in Title VI pertaining to the use of alternative disputes resolution. However, past experience suggests that the Board will be disinclined to pursue this approach if the parties do not agree to be bound by the outcome. Title IV does not address that issue, which is important because there is a prevailing issue as to whether the government is bound by arbitration (absent its consent).

In prior testimony and in correspondence, ARWG has stated that greater emphasis should be placed on the resolution of bid protests through an agency disputes process involving an ombudsman or senior official -- at least, as an initial first step. Title IV does not focus on this aspect of the process. It would be beneficial if Title IV requires the FAR to promulgate procedures and regulations governing agency-level bid protests, like the Army Materiel Command, so that the process would be more formalized, more objective, and would provide for a meaningful review and assessment above the level of the contracting officer.

ARWG also has supported the continued jurisdiction of the Federal district courts and the U.S. Court of Federal Claims as provided for in Title IV. While Title IV addresses many other issues which are integral to this subject, such as the consolidation of the civilian agency boards, the standard of review for the GSBICA under the Brooks Act, the role and mission of the GAO, ARWG has not yet reached a consensus on these matters.

Consensus Regulations

In some of our recommendations related to H.R. 1670 (especially in Title I), we have compromised our own and your aversion to being overly prescriptive in statutory language and direction to the Executive Branch. Our position is a result of our real-world experience with the conversion process from law to regulations. The trend in the implementation of FASA regulations is a case in point, where the regulation writers have proven to be very conservative and traditional in some of the key areas. In short, we believe specific legislative guidance in certain areas is necessary to ensure a clear understanding by regulators of congressional vision and intent.

Furthermore, it is our strong belief that the impacts of the change in the competition standard in Title I are so far-reaching

and diverse that a consensus rulemaking process represents the best means for developing an effective, fair and comprehensive rule. We urge that you include in the legislation a requirement that a consensus rulemaking process be implemented for the development of the regulations pertaining to Title I of the bill.

III. EXECUTIVE BRANCH ACQUISITION REFORM INITIATIVES

Military Specifications and Standards

During 1994, DOD made two significant regulatory moves on their own to enhance their access to commercial technologies and processes. In February 1994, then Under Secretary of Defense for Acquisition and Technology John Duetch moved to implement the ISO-9000 Commercial Quality Standards. In June 1994, then Deputy Secretary of Defense William Perry announced the elimination of over 30,000 military specifications that should streamline the process. The cultural change needed, however, remains an impediment to implementing this commercial quality process. Furthermore, we have not yet seen the full departmental implementation of the contract regulations regarding milspecs.

Contract Close-Out

Earlier this month, Director of Defense Procurement Eleanor Spector issued a class deviation from the FAR to increase the use of quick close-out procedures in defense contracts. Such procedures require the release of 75 percent of all fee withholds on completed cost-type contracts and allows release of up to 90 percent of all withholds in certain circumstances. As mentioned previously, ARWG has been a proponent of quick contract close-out and worked closely with the Administration on the language. The class deviation should eliminate the need for industry to pursue legislative action on contract close-out, as originally recommended by ARWG. We very much appreciate the Department's work. A FAR case to make these changes applicable government-wide was recently published for comment.

Low Value Property

Mrs. Spector also recently authorized a class deviation from the FAR recordkeeping and inventory requirements for special tooling, special test equipment and plant equipment with an acquisition of \$1,500 or less. The deviation still holds defense contractors accountable for such government property (termed "low value property") but relieves them of the requirement to track the equipment, thus eliminating the need to perform periodic physical inventories. Low value property represents over 75 percent of the items of government property held by contractors, but accounts for only a small percentage of the value. ARWG has sought action in

this area and is pleased with the class deviation which will significantly help reduce costs.

FAR Rewrite

In the past several years, the impetus for comprehensive reform of the acquisition process, long called for by the private sector, has grown in both the legislative and executive branches. Industry is encouraged by the fact that this Congress and Administration have taken many bold steps toward "reinventing" the federal procurement process.

Industry believes that a clear, focused, objective for a FAR rewrite initiative should be "a reinvention of the buyer-seller relationship for the 21st century." The goal of this initiative would be a reinventing of the FAR system, as opposed to simply rewriting the FAR. This objective is an important element of meaningful acquisition reform and culture change.

Development of the FAR as a single, government-wide regulation, beginning in 1978, involved over 300 man-years of effort by the government teams alone, and several hundred more man-years on comments and revisions. Knowing that, it is disturbing to hear proposals to rewrite the FAR in six months, or to reduce the FAR to a set of guiding principles.

To achieve the balanced approach to change that we all desire, industry recommends a comprehensive evaluation of the FAR system and process by a joint government/industry commission. The commission should perform the following:

- First, a thorough examination of the FAR system and the process by which all guidance is promulgated. This would include the organization, authorities, public-private interactions, management discipline, priority setting mechanisms and other important elements of the FAR architecture.

- Second, a thorough examination of the multiple formal and informal rules, both mandatory and discretionary. The review should include both primary or top level documents, e.g. the FAR, as well as supplements, policy directives, standard operating procedures, "how to" manuals, and other guidance documents. The Contracting Officer's ability to exercise independent judgment and to be innovative is impacted by all of these.

The commission should provide specific recommendations for both of these related tasks defined in terms of policy, organization, and system/process changes.

Industry envisions the work of this commission to be a one-year effort. Its members should include an equal number of senior government and private sector contracting experts (for example, senior executive level/vice presidents of contracts). The DOD Advisory Panel on Codifying and Streamlining Acquisition Law approach (established in the FY 1991 Defense Authorization bill) is instructive, both as to the appointment of commission members and the thorough scope of review.

An important aspect of this systemic review is the need to address the structure, basically assessing the concepts of mandatory, non-mandatory, and statutorily mandated FAR requirements, keeping in mind that federal procurement must be conducted with "integrity, fairness, and openness." This fundamental principle may be compromised or sacrificed if well-established policies, procedures, practices, clauses and forms are eliminated from the FAR.

In looking at the FAR system, the commission should evaluate the FAR process. The FAR is not a static document to be "rewritten" once and declared a success. Rather it is constantly modified to reflect changes in law, policy, and experience. We believe the current process of modifying the FAR is obsolete and unresponsive to its customers (the public and the government).

An example of the need for evaluation of the FAR process is the significant numbers of open FAR cases, some dating back more than four years, that could benefit both government and industry by clarifying long-standing confusion in language or interpretation. Such cases need to be brought to a reasonable conclusion. Over fifty percent of open cases are more than two years old. That is longer than the entire life cycle of many industrial products. The FAR process is seriously overburdened with serial steps, excessive coordination and independent bureaucratic structures, and ultimately, no true accountability for results (quality, relevance, timing). Therefore, a FAR system reinvention must be accompanied by an equally vigorous effort to put flexibility, responsiveness and accountability into the process by which the FAR is modified.

Upon completion of the commission's research, and based on its conclusions, the recommended structure and process should become the basis for a comprehensive rewrite of the FAR.

CONCLUSION

Again, the Acquisition Reform Working Group would like to thank the Committee for this opportunity to testify. We recognize that it would be easy to rest on last year's laurels -- especially since this Committee did yeoman's work. More, however, remains to be done in order to promote an acquisition system that can move the government and industry into the 21st Century.

We appreciate the willingness of the Committee to reach out to industry in developing acquisition streamlining measures. We look forward to continuing the dialogue.

Acquisition Reform Working Group

Aerospace Industries Association
American Defense Preparedness Association
American Electronics Association
Contract Services Association
Electronic Industries Association
National Security Industrial Association
Professional Services Council
Shipbuilders Council of America
U.S. Chamber of Commerce

1995 ARWG AGENDA

1. Contract Close-Out Streamlining
2. Simplified Solicitation
3. Certification Elimination
4. International Competitiveness
5. Additional Commercial Item Waivers
6. Amend Post-Award Audit
7. Elimination of Non-Standard Clauses
8. Domestic Source Restrictions
9. Waiver of Ethics Provisions
10. Information Technology Review
11. Increased Small Business Opportunities
12. Sale of Government Property

ACQUISITION REFORM WORKING GROUP (ARWG)
RECOMMENDATION ON H.R. 1670 - TITLE I

o Pre-Offer Phase

- 1) Agency must post notice of intent to issue a solicitation; notice includes a reasonably detailed synopsis of requirements as well as the criteria on which both early narrowing and final source selection will be based. Notice also specifies that the Agency will require brief statements of interest/qualifications from firms wishing to participate in the solicitation, and that all parties submitting such information will be notified by the agency if the agency believes the firm has a reasonable chance of prevailing. The notice must also include an announcement of any agency intent to seek to limit the competitive range in the post-offer phase, and the criteria on which such a downselect decision will be made.
- 2) All interested parties must respond to the notice with brief synopses of qualifications and interest addressing the agency's evaluation criteria.
- 3) Agency conducts initial evaluation of responses of interests and capabilities and issues advisory opinions (regarding a firm's competitive position) to all firms that submitted such responses, based on the baseline criteria contained in the initial notice.
- 4) Agency issues formal solicitation to all companies who, based on the preliminary screening, are deemed to have a chance of success. Any company that was notified it was not likely to prevail, but still wishes to pursue the procurement, may request a solicitation and proceed. Offerors who did not respond to the initial request for statements of qualifications and interest may also still request solicitations at this point, but the government has no obligation to consider their proposals.

o Post-Offer Phase

- 5) Agency may evaluate proposals and eliminate certain offerors from the solicitation (according to criteria specified in the notice of intent and solicitation) as long as there remain no fewer offerors in the competitive range than announced in the notice of intent, and providing that immediate debriefings are made available to those offerors who are eliminated. This elimination from the solicitation decision is protestable.

In addition, while ARWG believes no changes to a solicitation should be allowed after it is issued, there should certainly be none allowed after a downselect.

RATIONALE. ARWG believes this approach carries many advantages and can be tailored to be used on both large dollar procurements with relatively short bidder's lists, and for smaller dollar procurements and commodities purchases that may attract literally hundreds of qualified offerors.

ARWG Amended Blueprint for a Bid Protest System Four-Phase Approach

Phase-1: Debriefings

- Mandatory, as required by FASA.
- Better communication between contracting officials and proposers will be the first step toward avoiding protests.

Phase-2: Agency Senior-Level Review

- Optional process of review by objective senior agency official.
- Procurement is suspended during review.
- Gives responsibility of resolution to the agencies.

Phase-3: Board Supervised "ADR" Process

- Mandatory newly tailored "GAO-style" process.
- Automatic stay, subject to agency override, disregarded in the Board fashioning remedies.
- Dedicated function within the Board for this ADR process.

EITHER

Phase-4: USBCA Judicial Process

- Appropriate discovery and supplement to the record.
- Automatic stay, subject to agency override, disregarded in the Board fashioning remedies.
- Allow review for "arbitrary and capricious" decisions and violations of law and regulations.
- Specialized judges for major procurement sectors.

OR

Simplified Protest Procedures

- Mandatory for Contracts under \$1 million.

Policy Note: Extend district court APA standard of review on pre- and post-award protests to Court of Federal Claims.

American Electronics Association**AEA**

5201 Great America Parkway, Santa Clara, California 95054 Telephone: (408) 987-4200
1225 Eye Street, N.W. Suite 950, Washington, D.C. 20005 Telephone: (202) 682-9110

August 3, 1995


Representative Jan Meyers
Chair, Small Business Committee
U.S. House of Representatives
Washington, D.C. 20515

Dear Chairwoman Meyers:

Attached is a copy of testimony given before the House National Security Committee on Wednesday, August 2, 1995 by Mr. Tom Mulcahy, Chairman of the Board, Condor Systems, Incorporated, on behalf of the Acquisition Reform Working Group. It provides a small high technology firm's views on what needs to be improved in the government acquisition process.

Mr. Mulcahy outlined what should be changed in the government procurement system to help small businesses to more effectively compete in that market place. We request that this testimony be entered into the record of your Small Business Committee hearing proceedings on acquisition reform on Thursday, August 3, 1995. It may be of help to you in your evaluation of H.R.1670.

Sincerely,



John F. Mancini
Chief Operating Officer

AMERICAN ELECTRONICS ASSOCIATION



U.S. House of Representatives

Committee on National Security

Hearings on Government Acquisition Reform

**Statement of Mr. Thomas Mulcahy
Chairman of the Board
Condor Systems, Inc.**



**on behalf of the
Acquisition Reform Working Group**

August 2, 1995

American Electronics Association

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Remarks
of

Thomas Mulcahy, Chairman of the Board, Condor Systems, Inc.
for hearings before the Committee on National Security

August 2, 1995

Thank you Mr. Chairman and distinguished members of the Committee. My name is Tom Mulcahy and I am Chairman of the Board of Condor Systems, Incorporated. Condor Systems was started in 1981 and we currently employ four hundred people. We manufacture electronic and signals intelligence components and systems for the Department of Defense (DoD) and national agencies. About 20 percent of our business is internationally oriented and we are pursuing more in that arena. Due to the extreme costs associated with commercializing a defense oriented business, we have chosen to maintain our business focus on the defense market and are growing in the near term by acquiring similar product lines from our competitors and entire small companies. In the next several years, we plan to transition some of our technologies and diversify our business base into commercial markets. For all of the reasons just mentioned, I am personally interested in savings that can be gained from acquisition reform.

I know reform of the acquisition process is not easy and will take a great effort on everyone's part; however, it is important and it must move forward. I applaud you, Chairman Clinger, Representative Dellums and Representative Collins for your leadership in that regard and the American Electronics Association as part of the Acquisition Reform Working Group (ARWG) looks forward to continuing our work with you and your Committees on future efforts to streamline the acquisition system. We support the comprehensive reforms represented by H.R. 1670 to achieve more savings for both the taxpayer and the government and look forward to its passage.

Today, I would like to provide a small business' view of what true acquisition reform should be. It is from my 40 years experience in defense contracting that I relate my recommendations to change the procurement system. It is important to note that some of my thoughts are my personal views and not that of the ARWG. It is also important to recognize that some of what I have to say has to do with the "culture" or mind set of those involved in the acquisition process. Momentum has been created from Congress' excellent work and passage of the Federal Acquisition Streamlining Act of 1994 (FASA). I encourage Congress to use this momentum along with the current regulatory efforts underway on FASA to change this culture. A continued demonstration of aggressive leadership will be required if the spirit of acquisition reform, as well as FASA is to be properly implemented from law and into practice.

This long-range industry commitment to reform of the procurement system is evident upon review of the membership roster of the association members of the ARWG, which includes not only large firms, but thousands of small and medium-sized businesses. While progress has been made to date, there are actions, some of which Congress has already taken, which can redefine the acquisition system in a way that will result in an increasing role for small businesses. These actions generally relate to four broad areas. The first is reducing the regulatory stranglehold on small businesses, the second is the need for more commercial products legislation, the third is

the onerous audit oversight experienced by all contractors, and the fourth is related to programs that enable all sizes of firms to maintain profitable operations in the decreasing defense market.

Regulatory Strangulation

The government acquisition process and associated regulations literally cost Condor Systems millions of dollars of unnecessary overhead that does not exist in the commercial sector. As we begin to pursue commercial business we will be looking for ways to squeeze every bit of overhead out of our operational costs and hope to utilize the regulations resulting from FASA and this year's bill, the Federal Acquisition Reform Act of 1995.

Another problem for small businesses is the compounding of regulation upon regulation. For example, Congress will pass a law which will result in the development of a new acquisition regulation or acquisition policy by the Office of Federal Procurement Policy. After this is done, each service or agency develops a rule or regulation which is their interpretation of the federal policy. Their subordinate commands do the same. These agency supplements to the FAR enable the contracting officers to impose unique agency requirements which the private sector do not have access to for review. Elimination of these agency supplements would be a major improvement which I feel many government Contracting Officers would also welcome. By the time this flows down to the small business trying to do work with the government, we have absolutely no idea of the total extent of the regulations that are being applied to us.

Commercial Products and Practices

Other obstacles to doing business with DoD are the current rules that make it almost impossible for a manufacturing facility to produce both military and civilian products on the same factory floor without having to worry about violating federal regulations, statutes and/or accounting rules. The pending Commercial Products regulations from FASA should eliminate most of the barriers that prevent companies from manufacturing both military and commercial products on the same production floor; however, we anticipate their final publication. Although Condor Systems is not a commercial products supplier, many of our products have commercial contents included in them. I anticipate that our suppliers will benefit from these changes in the regulations thereby cutting our inventory and supplier costs as well. Also, we will take full advantage of these new regulations as we transition some of our technologies to the commercial market. Ultimately, we feel that no government-unique terms and conditions should apply to commercial products contracts.

The draft Truth In Negotiations Act (TINA) regulations from FASA, which industry fought hard for to ensure that the intent of the legislation was finally written into the Federal Acquisition Regulations, should benefit the electronics industry and the government as well. These regulations will enable companies, especially small ones, to limit their operating costs by having less government unique oversight requirements and be able to simultaneously produce both military and commercial products, such as, microelectronics. The pending TINA regulations need further enhancements, however. H.R.1670 will correctly address these changes by

eliminating the two year post-award audit provision. The Government Accounting Office also testified earlier this year before the Government Reform and Oversight Committee that this impediment to commercial contracting should be eliminated.

In our continuing efforts, industry has made many proposals, which the Committee has included in this year's legislation to further increase the government's ability to buy commercial products on commercial terms. We strongly support the additional commercial products legislation in Title II of H.R. 1670. FASA created a new system for commercial product acquisitions and waived a number of statutes that were identified as barriers to the commercial marketplace. The statute, however, did not remove many of the significant barriers at the prime contract level. While greater flexibility was provided in FASA for subcontracts, H.R. 1670 will provide the relief for prime contractors.

Audit Oversight

Audit oversight is one of the most onerous and burdensome areas that defense and government contractors must operate under. DoD's recently-released process action team report on oversight and review clearly recognizes the non-value added burden of much of the historic DoD on-site oversight. My concern is how many of the recommendations will be implemented. Congress should direct that there should be some relief from the onerous and burdensome audit system. We realize that certain measures need to be in place to ensure that the government is not being "ripped off". Industry has made deep cuts in its work force and overhead to remain competitive, however, the number of audits have increased and the amount of auditors has only slightly decreased since 1990. Companies in the defense industry no longer have the resources to respond to the constant on-site audit teams. The inquisition mentality still exists within DoD rather than an acquisition mentality. We feel that the Defense Contract Audit Agency (DCAA) has not taken these issues into account. For instance, Condor Systems had a contract award for \$700,000 which had been fully reviewed and approved by the contracting officer. The DCAA reviewed the award for several days and concluded the proposal cost should be reduced by \$32,000 - on their best judgement. In contrast, the contracting officer told us that we should actually increase the cost of our proposal.

Contract Streamlining and Close-Out Problems

Major contracting problems are faced by all companies, but especially by small firms because of the high risk investment currently associated with defense contracting. We live with gaps in the contracting process, slow payment of invoices, and the piling on of regulations by agencies. In some cases, solutions exist but agencies are unwilling to implement them. In conjunction with industry's recommendations to reform contract financing, Congress could help small businesses by enacting appropriate legislation which would encourage/require government contracting officers to use the tools available to them when working with small businesses.

A contract-related problem for small businesses is what could best be called lapses in the contracting cycle. By this I mean a scenario whereby a small company is under contract to

provide a product or service. The work is such that it will span more than one fiscal year and is incrementally funded or takes the form of a basic ordering agreement with multiple tasks. Because of the flow of money and the delays in the processing of contracts, there are gaps of weeks or months between the end of one task and the beginning of the new one. Even though we know there is going to be follow-on work, and that the money is available and contract instruments are in process, we cannot start work. We must lay people off because small businesses cannot afford to carry individuals on overhead. This is highly disruptive to all companies and for the customer alike and does not keep a team together for a project. Small business strongly endorses legislative changes made by the ARWG for the government to implement commercial financing practices.

The cultural change that I spoke about earlier needs to address the elimination of the risk-averse mentality. I illustrate my point with the following example. In most cases, the funding exists on a proposal that has been approved but it is awaiting final sign-off. Work can not be started until the contracting officer or approving authority signs off on the contract award. These delays disrupt business operations relating to manpower loading and increase indirect costs to the contractor. One solution appears to be fairly simple. Require contracting officers to fully utilize part 31.109 of the Federal Acquisition Regulations ("Advanced Agreements"). This clause allows the contracting officers to authorize precontract costs for work that is going to be performed. The problem is, almost no contracting officer will use this clause because there is reluctance on the part of higher echelon commanders to authorize its use. The proper application of this clause could solve many small business problems. These issues are mainly administrative in nature, but the "culture" will not give the small contractor a break. Title III of H.R.1670 is an excellent step and should thoroughly address these issues. We encourage Congress to force changes in the acquisition culture by recommending administrative and regulatory changes be implemented government-wide.

Getting paid for completed work in a reasonable amount of time is also a serious problem for small businesses. In the past, it was normal to be paid in 30 to 45 days; now it may take as long as 120 to 150 days if you do not assign someone fulltime to the payment schedule. The invoice approval process is the problem. In the past, you submitted an invoice to the Defense Contract Audit Agency who would then forward it to the payment office for payment. This process worked fine. However, in some cases now we must submit the invoice to our Contracting Officer's Technical Representative (COTR) for review; he or she sits on it for 90 days or disagrees with a minor change and we are stuck with the additional delay. When the COTR finally forwards the invoice, we then have to go through the regular 30 to 45 day payment process. Condor Systems experienced a case where the COTR was temporarily assigned overseas for 30 days, which was extended three times for a total of 120 days. Our invoices sat on his desk for the entire time he was gone. Our constant inquiries resulted in the answer that he was the only individual that could approve and validate the work that was performed. These practices should not be allowed to occur. Other personnel should be allowed to approve payment on contracts if the contract is in order, however, this risk aversion will not disappear if individuals are not rewarded for making good business decisions versus keeping the government out of "hot water".

Another aspect of this issue is contract close-out delays. These delays create severe cash flow problems and long-term, burdensome accounting documentation, especially for small businesses. It seems to take forever to close out contracts, which results in long overdue final payments for work we have completed. Condor has waited as long as two years for final payment for work that was completed. While some companies wait as much as nine years, which is unacceptable and by no means short, it is not as extreme as some cases that I have heard about where companies have waited for as long as 14 years. These are poor business practices for the government to follow, however, industry has no recourse. As a business, I must wait for final payment and during that time pay interest on the money. These practices dramatically effect our profits which are either reduced or over time, totally eliminated. To correct these problems, I feel that your Committee should review for serious consideration the ARWG's proposal for Contract Close-Out.

Recommendations

The ARWG has several recommendations for expanding small business participation in the Federal Procurement System.

First, we recommend that as part of the culture change and less government oversight, that this Committee maintain their strong, positive position on eliminating the post-award audit provisions of section 1204 and 1251 of FASA. Commercial oriented companies, particularly small businesses and those that are trying to diversify out of defense work, cannot afford the costs nor loss of time associated with government auditors reviewing records and attempting to "second guess" a contracting officer's judgement. It is difficult to run a small business in a profitable manner and simultaneously try to meet these oversight requirements.

Second, pending the publication of the FASA Commercial Products Regulations, we recommend additional changes to existing regulations that facilitate the use of the same production lines for both military and commercial items.

Third, we recommend that unnecessary duplication of regulations be eliminated. There should be only one interpretation of a rule or policy, not multiple agency procurement supplements.

Fourth, we recommend that there be some correction to the delays in contract close-out by accelerating the close-out process. The ARWG has made detailed recommendations in our proposal which include a 60 day close-out provision for both contracting parties. Optimally, all administrative and financial milestones should be completed at the end of one year.

Fifth, a means of contract payment acceleration needs to be achieved. I would personally recommend that the Prompt Payment Act be extended to small businesses operating under any type of contract and that the time clock start when the invoice is delivered to the government, not just the payment office.

Sixth, we recommend something be done to minimize the instances of contract/task order lapses

that disrupt small business operations. We recommend that the laws and/or regulations be modified such that when a small business requests precontract costs, and certain conditions are met (e.g., funds are available and work package is awaiting signature only), the precontract costs are automatically granted unless the contracting agency can show why this should not be.

Seventh, we recommend that Congress continue support for Secretary Perry's and Under Secretary Kaminski's efforts to acquire commercially available items when practical. We also strongly approve of DoD's adoption of ISO-9000 commercial quality assurance standards.



HEALTH INDUSTRY GROUP PURCHASING ASSOCIATION



HEALTH INDUSTRY GROUP PURCHASING ASSOCIATION

STATEMENT FOR THE RECORD

**SMALL BUSINESS PARTICIPATION
IN FEDERAL CONTRACTING**

**Assessing H.R. 1670
The "Federal Acquisition Reform Act of 1995"
as reported by
The Committee on Government Reform and Oversight
on
July 27, 1995**

**Committee on Small Business
U.S. House of Representatives**

August 3, 1995

**Robert Betz
Executive Director**



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SUMMARY OF WRITTEN STATEMENT SUBMITTED FOR THE RECORD

BACKGROUND

Section 1555 of the Federal Acquisition Streamlining Act of 1994 (hereinafter, "FASA" or "the Act") (P.L. 103-355) provides the General Services Administration (GSA) with the discretion to expand access to Federal Supply Schedules (FSS) to any state, department or agency of a state and any political subdivision of a state, including a local government.

These "governmental" entities, which constitute over one-third of the health care market, currently use private sector purchasing techniques to negotiate discounts with manufacturers. The General Services Administration (GSA), published a notice in the April 7, 1995 issue of the *Federal Register* implementing Section 1555 of the Act.

SUMMARY STATEMENT OF THE ISSUE

The private sector has been extremely effective at negotiating price discounts with manufacturers for the entities covered by section 1555 of FASA, as noted in recent studies by the General Accounting Office (GAO). There has been no market failure necessitating governmental intervention and governmental administered pricing; collective purchasing likely would not prove more effective at obtaining discounted pricing for medical products for FASA entities than the market.

Allowing non-federal users access to the FSS would cause extensive private sector harm that could have severe and unintended implications for prices paid by all providers of health care. Permitting FASA entities access to FSS pricing would disrupt the private sector market and would likely not result in lower prices for these purchasers.

A broad interpretation of section 1555 could result in successful private sector pricing negotiations for FASA entities being replaced with defacto government administered pricing and collective purchasing. A broad interpretation for products and pharmaceuticals purchased by FASA entities would be unusual and unnecessary because the government typically does not intervene and impose government administered pricing when entities have access to competitive, market-based pricing, as most FASA entities currently do.

POSITION STATEMENT

The Health Industry Group Purchasing Association firmly believes there is no justification for interference by the federal government in the current sales system which has been in place for many decades. In this era of reduced government, it is incomprehensible that

an expansion of GSA into state and local government purchasing — at the expense of small business across the country — would be permitted. Nonetheless, the law is in place and GSA is moving swiftly to implement it. Repeal of Section 1555 is necessary, or, in the alternative, significant modifications to the law are warranted.

The Health Industry Group Purchasing Association vigorously opposes the extension of FSS pricing for medical supplies and products to FASA entities. Therefore, HIGPA urges Congress to repeal Section 1555 of the Federal Acquisition Streamlining Act of 1994.

In the alternative, HIGPA urges Congress to amend H.R. 1670 to include a provision to instruct the GSA Administrator to refrain from (1) approving FASA entities — such as state or governmental hospitals — from purchasing off the federal supply schedules; and, (2) approving FASA entities from purchasing off certain federal supply schedules, such as those for medical supplies and pharmaceuticals.

Madam Chair and Members of the Committee, I appreciate this opportunity to convey the concerns of the Health Industry Group Purchasing Association (HIGPA) about implementation of the Cooperative Purchasing program legislated as part of the Federal Acquisition Streamlining Act of 1994 (FASA). I urge you to reconsider the appropriateness of the Cooperative Purchasing program for health care and perhaps other industries as well.

The Health Industry Group Purchasing Association is a broad-based trade association whose members are organizations engaged in providing cost containment services — such as group purchasing — to health care providers. The membership of HIGPA is made up of for-profit and not-for-profit corporations, voluntary and religiously-affiliated purchasing groups, state, regional and metropolitan trade associations, multi-hospital systems and health care provider alliances.

The group purchasing industry, as a whole, represents 100 percent of the acute care hospitals in the United States. HIGPA's members purchase on behalf of the vast majority of nation's health care providers and maintain portfolios of hundreds of purchasing agreements covering hundreds of thousands of individual items. Today, HIGPA members service nearly 80 percent all the acute care hospitals in the country.

HEALTH CARE GROUP PURCHASING

Many hospitals and other providers have long purchased prescription drugs, supplies, durable medical equipment, etc., in large quantities for use by their patients. For most hospitals and health care providers, the prices of these products are negotiated by a group purchasing organization (GPO) to which the provider belongs or is affiliated.

GPOs negotiate prices of goods and services for participating health care providers at costs below those which the members would be able to obtain individually. Through a sophisticated bid or negotiation process, GPOs maximize competition, resulting in lower prices for goods and services for their member health care providers. Assuming free market competition, GPOs can offer tremendous efficiencies to the nation's health delivery system.

GPOs are able to obtain significant discounts because of the large volume of purchases represented by its members and other economies arising from marketing and distribution that the manufacturer realizes from this type of sale. The discounts negotiated by large purchasers like HIGPA members have had a beneficial effect on overall health care costs.

GROUP PURCHASING — BENEFICIAL IMPACT

The effectiveness of group purchasing as a cost containment method is widely recognized and accepted by the hospital industry and is gaining increasing acceptance by other providers of health care services. HIGPA members have successfully worked to reduce health care costs through negotiated contracts with manufacturers and distributors providing the goods and services used by its member health care providers in meeting the needs of their patients.

Congress has acknowledged the positive impact that GPOs have had on the health care industry, specifically pointing out that "GPOs can help reduce health care costs for the government and the private sector alike by enabling a group of purchasers to obtain substantial volume discounts on the prices they are charged."¹

STATEMENT OF THE ISSUE

Section 1555 of the Federal Acquisition Streamlining Act of 1994 (hereinafter, "FASA" or "the Act") (P.L. 103-355) provides the General Services Administration (GSA) with the discretion to expand access to Federal Supply Schedules (FSS) to any state, department or agency of a state and any political subdivision of a state, including a local government. These "governmental" entities, which constitute over one-third of the health care market, currently use private sector purchasing techniques to negotiate discounts with manufacturers. The General Services Administration published a notice in the April 7, 1995 issue of the *Federal Register* implementing Section 1555 of the Act.

BACKGROUND

The Federal Acquisition Streamlining Act of 1994 was signed into law by President Clinton on October 13, 1994. Section 1555 of the Act amended Section 201 of the Federal Property and Administrative Services Act of 1949 to provide that "the Administrator [of GSA] may provide for the use of Federal supply schedules of the General Services Administration by any of the following entities upon request: (i) A State, any department or agency of a State, and any political subdivision of a State, including a local government." This provision could allow *any* "governmental" entity to purchase from *any* of the federal supply schedules once such an entity and the schedule from which the purchase would be made were approved by the Administrator of the GSA. The law requires that the schedules for all products be opened to "governmental" entities. The GSA Administrator has some discretion in implementing this Act, and has subsequently delayed expanding access to FSS pricing for name brand pharmaceuticals and certain medical equipment and supplies for the time being.

¹

Committee on the Budget, U.S. House of Representatives, Report to accompany H.R. 5300 (H. Rpt. 99-727), p. 73

Pharmaceuticals are currently available on the FSS. Governmental entities which are currently entitled to purchase off the FSS comprise approximately two to three percent of the market for pharmaceuticals. Expansion of access to the FSS to all of the "governmental" entities described in Section 1555 of FASA ("FASA entities") would extend FSS pricing to more than one-third of the U.S. (or "domestic") market for pharmaceuticals.

The General Services Administration published notice of its implementation plan in the *Federal Register* on April 7, 1995. GSA's plan is designed to make its federal supply schedules available upon request for use by either a state, any department or agency of a state, or any political subdivision of a state, including a local government. The GSA plan implements Section 1555 of the Federal Acquisition Streamlining Act of 1994 (P.L. 103-355) which deals with cooperative purchasing of products by governmental entities. Public purchasers of this type could include public health departments; state, county and municipal hospitals; disproportionate share hospitals; prisons; public clinics; and, municipal nursing homes.

The GSA Administrator determined that "it would not be in the interest of the federal government" to make the drugs and pharmaceutical products as well as and the medical equipment and supplies schedule available to non-federal users. "Certain unique statutory requirements (P.L. 102-585, the Veterans Health Care Act of 1992) impacting the pricing and availability of products apply" to these schedules. "These unique statutory requirements when combined with the cooperative purchasing provisions would have the unintended effect of increasing costs to the federal users of the schedules."

Currently, participation by most manufacturers in the FSS is voluntary. However, Section 603 of the Veterans Health Care Act of 1992 requires pharmaceutical manufacturers to sign an agreement with the Administrator of GSA stating that all "covered drugs" that they manufacture will be made available through the FSS. Covered drugs include branded inpatient as well as outpatient drugs. Failure to enter into such an agreement precludes a manufacturer's products from being reimbursed under the Medicaid program and being paid for by federal purchasers.

The agreement with the Department of Veterans Affairs also requires manufacturers to sell covered drugs to the Department of Defense ("DOD"), the Department of Veterans Affairs ("DVA") and the Public Health Service ("PHS") at no more than seventy-six percent of the non-federal average manufacturer price. Sales to purchasers other than the three agencies described above are not subject to the "ceiling price" in the agreement.

Many state and local governments for whom access to FSS pricing may be expanded by the Act currently negotiate discounted pricing from manufacturers or use the services of group purchasing organizations to negotiate on their behalf with manufacturers. The

discounts these entities have been able to obtain on the products they purchase, including pharmaceuticals, have been substantial and have resulted in reduced costs for these entities and, ultimately, to the entire health care delivery system.

PENDING LEGISLATION

The Federal Acquisition Reform Act of 1995 (H.R. 1670) was introduced in the U.S. House of Representatives by Representative William F. Clinger, Jr. (R-PA) et al., on May 18, 1995. The measure is designed to further the federal procurement reform efforts initiated by the Federal Acquisition Streamlining Act of 1994.

In general, H.R. 1670 modifies the acquisition laws of the federal government by simplifying data and audit requirements of commercial businesses contracting with the federal government; simplifying the sale of commercial items to the government; promoting the government's use of commercial sources; and, simplifying the current bid protest and dispute resolution process.

As currently written, H.R. 1670 contains no specific provision on point with reference to Section 1555 of the FASA Act of 1994. Nevertheless, if properly amended and/or modified, H.R. 1670 could preserve the economic efficiency of the current private sector group purchasing sector serving the health care system of the United States.

DISCUSSION

The Health Industry Group Purchasing Association firmly believes there is no substantial policy justification for interference by the federal government in the current purchasing system which has been in place for many decades. A successfully functioning private sector system exists for health care group purchasing and the duplication by the federal government of this function is not only unnecessary, but unwise. In this era of reduced government, it is incomprehensible that an expansion of GSA into state and local government purchasing — at the expense of small business across this country — would be permitted. Nonetheless, the law is in place and GSA is moving swiftly to implement it. Timely repeal of Section 1555 is necessary, or, in the alternative, significant modifications to the law are warranted.

Section 1555 of the Act grants the General Services Administration authority to act as a purchasing agent for an unlimited variety of goods on behalf of state and local governments as well as other "public entities." There appears to be no legislative history explaining the need for this provision, but the potential damage it could wreak in the private sector is enormous.

Permitting FASA entities access to FSS pricing would disrupt the medical supply and pharmaceutical market and would likely not result in lower prices for these purchasers for several reasons:

First, FASA entities currently benefit from market-based pricing. As an example, pharmaceutical manufacturers currently offer discounts to purchasers that perform functions, such as using a formulary or other drug utilization management technique, to increase sales of a manufacturer's products that, but for the performance of such actions, might have gone to the manufacturer's competitors. Those purchasers, such as FASA entities or the group purchasing organizations purchasing on their behalf, that perform such functions effectively can earn deep discounts from manufacturers. FSS pricing does not reflect such market forces — providing access to FSS pricing for FASA entities would remove these entities from the pharmaceutical market and would replace market prices with government administered pricing. Furthermore, providing access to discounted pricing for purchasers who are able but unwilling to perform such market share movement functions permits those purchasers to be free-riders.

Second, FASA entities would not have access to all of the discounted pricing available to the federal government. Again as an example, the DOD, DVA and the PHS pricing, by agreement with pharmaceutical manufacturers required by the Veterans Health Care Act of 1992, would not be available. The FSS for pharmaceuticals contains dual price lists — one for the agencies listed above and one for all other purchasers. FASA entities would have access only to the price list for all other federal purchasers.

Third, although the FSS pricing for medical products and pharmaceuticals available to entities other than the DOD, DVA and PHS may in some cases be lower than other pricing available to certain purchasers or available for certain products, expanding access to the FSS may remove incentives for individual manufacturers to continue to offer such low prices. A certain manufacturer may be willing to offer deeply discounted prices to a limited number of federal purchasers. However, that manufacturer may be less willing to extend such low prices to purchasers constituting an overwhelming proportion of the market — especially since those purchasers may not be performing functions that would merit discounts. As a result, not only would FASA entities *not* receive the low prices currently available on the FSS, those entities that currently purchase medical products and pharmaceuticals on the FSS could be faced with paying *higher* prices for their drugs.

Fourth, under Section 602 of the Veterans Health Care Act of 1992, over 9,000 "covered entities," many of which are publicly owned clinics or disproportionate share hospitals, were granted special pricing for their outpatient drugs. Section 602 provided safeguards to ensure that the discounted pharmaceuticals purchased by these covered entities would not be diverted. Extending FSS pricing to these entities would impose another,

conflicting, drug pricing requirement and would do so with no protection against diversion and misuse of the drugs purchased.

TALKING POINTS

The following are talking points for limiting the scope of the FASA implementing regulations as they pertain to medical supplies and pharmaceuticals.

- The private sector has been extremely effective at negotiating price discounts with manufacturers for the entities covered by section 1555 of FASA, as noted in recent studies by the General Accounting Office (GAO).
- There has been no market failure necessitating governmental intervention and governmental administered pricing; collective purchasing likely would not prove more effective at obtaining discounted pricing for medical products and pharmaceuticals for FASA entities than the market.
- Most of the FASA entities currently benefit from government programs involving pharmaceuticals including Medicaid's rebate program and section 602 of the Veterans Health Care Act of 1992.
- Allowing non-federal users access to the FSS would cause extensive private sector harm that could have severe and unintended implications for prices paid by all providers of health care.
- A broad interpretation of section 1555 could result in successful private sector pricing negotiations for FASA entities being replaced with defacto government administered pricing and collective purchasing. A broad interpretation for medical products and pharmaceuticals purchased by FASA entities would be unusual and unnecessary because the government typically does not intervene and impose government administered pricing when entities have access to competitive, market-based pricing, as most FASA entities currently do.
- If the scope of the GSA's final regulation is not permanently narrowed by the Agency through limiting FSC 65 IB and FSC 65 VII or the entities covered, the competitive, market-based pricing currently negotiated by these entities likely will be replaced by government administered pricing and centralized purchasing. This action would result in unintended, adverse economic effects on the open market.

- There is no indication of Congressional intent regarding the treatment of supply schedules for medical supplies or pharmaceuticals. Congress did not contemplate that FASA entities would have access to FSS pricing.
- Because the Administrator of GSA "may provide for the use of Federal supply schedules of the [GSA]," the Administrator likewise has the discretion *not* to approve *certain FASA entities*, such as state or governmental hospitals, from purchasing off the FSS. The Administrator also has the discretion *not* to approve FASA entities from purchasing off *certain Federal supply schedules*, such as those for medical supplies or pharmaceuticals. Such limitations would be consistent with Congress' lack of intent to extend access to FSS for such entities or that such schedules would be made available.
- The conference report to Section 1555 of FASA states that "the conferees intend that the terms of each schedule holder's contract govern and that schedule contractors not be required to service other than federal government users unless the particular schedule contract so specifies." GSA may allow manufacturers to elect whether FSS pricing is to be made available to FASA entities. However, the Veterans Health Care Act of 1992 requires pharmaceutical manufacturers to list their products on the FSS. This requirement may be difficult for the election by a pharmaceutical manufacturer not to offer FSS prices to FASA entities.
- GSA's implementing regulations for FASA make no attempt to promulgate rules to prevent product diversion from FASA entities to other purchasers and to address other similar implementation issues as it did when enacting the Veterans Health Care Act of 1992.

POSITION STATEMENT

The Health Industry Group Purchasing Association (HIGPA) vigorously opposes the extension of FSS pricing for medical supplies, including pharmaceuticals, to FASA entities. HIGPA urges the adoption of an amendment to the pending legislation (H.R. 1670) to repeal Section 1555 of the Federal Acquisition Streamlining Act of 1994.

In the alternative, HIGPA urges Congress to amend H.R. 1670 to include a provision to instruct the GSA Administrator to refrain from (1) approving FASA entities — such as state or governmental hospitals — from purchasing off the federal supply schedules; and, (2) approving FASA entities from purchasing off certain federal supply schedules, such as those for medical supplies and pharmaceuticals.

CONCLUSION

The Health Industry Group Purchasing Association and its member organizations appreciate this opportunity to share with you and Members of the Committee our thoughts on the GSA's implementation of the Federal Acquisition Streamlining Act and the need for repeal of Section 1555 of that Act.

While the legislation (H.R. 1670) being considered by the Committee today contains no specific provision on point regarding Section 1555 of the Act, we urge the Committee to amend the measure accordingly. The Association firmly believes that in so doing, the committee's actions will go far in preserving the economic efficiency of the current private sector group purchasing sector which so effectively serves the health care system of the United States.

The HIGPA welcomes the opportunity to work with the Members of the Committee and their staff on this very important matter. Thank you.

A handwritten signature, possibly reading "J. L. ...", is located at the bottom left of the page. It appears to be a cursive or semi-cursive script.



Donald N. Muse, Ph.D.
PRESIDENT

**Federal Acquisition Streamlining Act of 1994:
The Effect of FSS Expansion on Federal Expenditures for Health Care Products**

At the request of the Health Industry Manufacturers Association (HIMA), we have conducted a review of data sources to estimate the impact of expanding the Federal Supply Schedule (FSS) to all public entities as proposed by the General Services Administration (GSA). Our efforts have focused on identifying that portion of the health care market held by public facilities in various health care provider categories, both in terms of percent of care and dollar value. In addition to market share, we have also estimated the effects of the FSS expansion on federal expenditures based on lessons learned during the recent implementation of the Medicaid rebate program for prescription drugs. The Medicaid rebate program represents what might happen to federal expenditures with respect to medical equipment and supplies.

Summary

Our findings on the public portion of the health care market are presented in Table 1. Data have been examined for health care facilities in the public sector for 1993, the most recent year for which national expenditure data for health care are available from the Health Care Financing Administration (HCFA). As indicated, public facilities account for at least \$96.2 billion (12.3 %) of 1993 national health care expenditures for personal health care services.¹ These figures, which are based on limited data pieced together from a number of different sources, represent a conservative estimate. Due to data limitations and definitional problems, actual public market share may be higher.

General economic and business marketing theory suggests that discounts will decrease as the share of the market receiving deep discounts expands. Data from the implementation of the Medicaid rebate program in 1991 to present show that deep discounts decreased by approximately 31 percent when Medicaid, approximately 15 percent of the pharmaceutical market, began to benefit from deep discounts given to other providers. Assuming similar behavior by FSS suppliers, federal government costs will increase by approximately \$1.35 billion per year or \$11.3 billion over seven years as a consequence of expanding FSS access to additional health care providers.

¹ Personal health care services are defined as health services and supplies minus expenditures for program administration, the cost of private health insurance and expenditures for government public health activities.

Size of FSS Market

According to GSA, "Federal agencies place approximately 1.9 million orders valued at approximately \$5.4 billion under approximately 7,000 schedule contracts each year."² Medical equipment and supplies account for \$2.565 billion, or 47.5 percent of all FSS purchases.³ This is equal to approximately 5 percent of the total U.S. medical equipment and supply market, which is estimated to be \$51.3 billion.

Assuming the same proportion of usage for medical equipment and supplies as for personal health care expenditures (12.3 percent), total public FSS expenditures for medical equipment and supplies would equal \$6.31 billion (\$51.3 billion \times 12.3%). This exceeds current purchases under FSS for all commodities and services. Thus, if public sector FSS purchases were to increase from the current 5 percent of the market to 12.3 percent, the dollar amount subject to the supply schedule would increase by nearly \$3.75 billion.

Effects on Federal Outlays of Expanding FSS Access

The following section addresses lessons learned from the Medicaid prescription drug rebate program. It includes an estimate of the cost to the federal government of expanding FSS access.

Lessons from the Medicaid Rebate Program

The Medicaid rebate legislation placed pharmaceutical companies at a financial disadvantage for offering best price discounts. Not unexpectedly, the legislation has dramatically altered the best price discounts offered by manufacturers in the first 39 months of the rebate program's operation. The average best price discount decreased from 33.3 percent in the first quarter of 1991 to 23.5 percent by the 2nd quarter of 1994, where it appears to have stabilized. Products⁴ with deep discounts of more than 30 percent have decreased from approximately 45 percent of the top 100 drugs to approximately 17 percent of the top 100 drugs. On the other hand, the number of top 100 drugs with minimal discounts has also significantly decreased.

²*Federal Register*, April 7, 1995, 60(67):1765

³Based on June 6, 1995 Industry comments submitted to GSA by HIMA and July 20, 1995, "1995 Fact Sheet on Medical Device Industry"

⁴ Data for all products discussed in this report have been weighted for dollar volume to the Medicaid program.

Average Best Price Discount

The following are the most recent data available for the average best price discounts under the Medicaid rebate program.⁵ The trend by quarter is as follows:

Quarter	Percent (Mean Discount)
1/91	33.3
2/91	32.2
3/91	31.6
4/91	32.2
1/92	27.2
2/92	26.0
3/92	27.4
4/92	25.4
1/93	24.2
2/93	23.9
3/93	24.3
4/93	24.1
1/94	23.2
2/94	23.5

As the data show, the best price discounts have decreased from 33.3 percent to 23.5 percent, a 31 percent decrease in discounts.

Cost to the Federal Government

As cited above, \$5.4 billion in purchases are being made by the federal government through FSS. Discussion with federal staff and industry sources suggest that discounts extended on nonpharmaceutical items are slightly higher than those for prescription drugs. Specifically, sources suggest that the discounts are on the order of 40 percent rather than the 33 percent observed in the prescription drug area, where a number of the products are manufactured by only one company. If discounts were to decrease on the order of magnitude of the Medicaid rebate program, say from 40 percent to 25 percent, federal government outlays would increase by \$1.35 billion per year⁶ or \$11.3 billion over seven years.

⁵ Data are published by HCFA, Office of the Actuary

⁶ The calculation is as follows. Assume that the non discounted price is \$9 billion. The federal government is receiving a 40 percent discount which yields the \$5.4 billion ($9 \times .6 = 5.4$) in federal purchases currently observed. If the discount fell to 25 percent of the price, current purchases would rise to \$6.75 billion ($9 \times .75 = 6.75$). Hence, the cost to the federal government would increase by \$1.35 billion ($6.75 - 5.4 = 1.35$) per year.

Details of the Public Market Share Estimate

The following section outlines how the public market share estimate was developed for each of the provider types contained in Table 1. Details of the sources behind these estimates can be found in Appendix A.

Table 1
Estimates of Public Facilities' Market Share

<u>Provider Category</u>	<u>Dollars of Care (billions)</u>	<u>% of Care Delivered in Public Facilities</u>
Hospitals	\$ 81.3	24.9
Nursing Homes	4.5	6.5
C/MHCs & Homeless Clinics	2.2	0.5
Penal System	1.9	0.4
ICF/MRs	6.3	1.4
Total	\$ 96.2	12.3*

* Not additive due to use of different data bases

Hospital Care

In 1993, there were 6,647 hospitals in the United States. Of these, 2,024 were identified as public institutions. Public hospitals accounted for 31% of all facilities but only 24.9% of total hospital expenses. According to the Health Care Financing Administration (HCFA) national accounts data, 1993 expenditures for hospital care totaled \$326.6 billion. Based on the HCFA data, the public hospital portion was \$81.3 billion.

These figures must be interpreted with caution. There is some lack of agreement over the definition of a publicly owned facility. If, for example, a private hospital's bonds are guaranteed by a local or state government, does this affect the facility's ownership status and, thereby, make it eligible for FSS prices? Also, if a hospital is owned by a county or municipality, but is operated under contract by a for-profit hospital management company, should the hospital be classified as public or private? Nursing homes and other providers are also subject to these same definitional problems. Such factors could affect both the classification of facilities and the proportion of care that is rendered by public institutions.

Nursing Home Care

According to the National Center for Health Statistics, there were 14,744 nursing homes in the United States with nearly 1.6 million beds in 1991. Only 725 homes (4.9%) with 100,000 beds (6.4%) were publicly owned. The remaining 14,000 homes were either proprietary or non-public, nonprofit facilities. Publicly owned nursing facilities averaged 138 beds in size and had occupancy rates of 93.5%. Using numbers of beds and occupancy rates, the total number of nursing home residents in both public and all facilities was estimated. Public facilities accounted for 6.5% of all nursing home residents.

According to HCFA, 1993 national expenditures for nursing home care were \$69.6 billion. Multiplying total national expenditures for nursing home care by 6.5% yields an estimate of \$4.5 billion for the public sector share.

Health Center Care

There are approximately 2500 community, migrant and homeless health centers in the United States. These include 2,000 community and migrant health clinics and about 500 health care for the homeless clinic sites. While some homeless grantees and clinic sites are community or migrant health centers, most are separate facilities located in or near shelters and other services for this unique population. These clinics serve 7.6 million clients each year and have total annual operating budgets of approximately \$2.2 billion. Federal grants (\$750 million) and Medicaid are their primary sources of funds. Community/migrant/homeless health centers account for 0.5% of expenditures for personal health care services, after hospital care has been factored out.

Penal Health Care System

On January 1, 1994, there were 892,270 inmates in approximately 1400 prisons within the federal and state penal systems. Based on data from 42 states, the District of Columbia and the federal correctional system, prison health care costs are estimated at \$5.90 per inmate per day or approximately \$2,154 per inmate per year. Annually, this comes to \$1.92 billion in health care costs for the correctional system or 0.4% of total national expenditures for personal health care services, after hospital care has been subtracted.

Facilities for the Mentally Retarded

In 1991, there were 1,477 publicly operated residential facilities for the mentally retarded serving nearly 90,000 individuals. Average maintenance expenditures per resident per day were \$193 or \$6.3 billion annually. ICF/MR services are 1.4% of total national expenditures for personal health care services (after hospital care has been subtracted).

Appendix A

Data Sources and Derivation of Calculations

The purpose of this technical appendix is (1) to detail the data sources used and (2) to explain how the calculations for public facilities' share of the health care market and expenditures and the estimate of the effects of the FSS extension on Federal procurement, were calculated. We have examined data for hospitals, nursing homes, community/migrant and homeless health centers, the penal system, and facilities for the mentally retarded. Several data sources were used to derive the calculations. They include both government agencies and private sector organizations.

Hospital Care

Data on hospital care were compiled from two sources: the American Hospital Association (AHA) and the Health Care Financing Administration (HCFA). AHA conducts an annual survey of hospitals and publishes data in *Hospital Statistics* on number of facilities and their characteristics, including ownership, services, utilization and financial information. HCFA publishes statistical information on national health care expenditures in an annual article in *Health Care Financing Review*. The most recent year for which data are available is 1993.

From *Hospital Statistics*, data were compiled on a number of facilities and expenses for all hospitals and for short and long-term public hospitals in the United States. Public hospitals accounted for 24.9% of all hospital expenses. The 1993 HCFA national accounts estimate for hospital care was \$326.6 billion. Multiplying the HCFA hospital care estimate by 24.9% results in a public hospital share of hospital care expenditures of \$81.3 billion.

Nursing Home Care

Information on nursing homes was obtained from the *1994 Statistical Abstract of the United States*. The original source data were compiled by the National Center for Health Statistics (NCHS). Among other things, NCHS collects data on number of nursing homes, ownership status, total beds, and occupancy rates. Using total number of beds and occupancy rates, an estimate of the number of total residents and residents of government owned facilities was calculated. Government owned nursing homes were estimated to serve 6.5% of all nursing home residents.

The 1993 HCFA national estimate for nursing home care was \$69.6 billion. The public facilities' share of nursing home expenditures was determined by multiplying total nursing home expenditures by the corresponding public sector percent. This calculation results in a public facilities' estimate of \$4.5 billion.

Community/Migrant/Homeless Health Centers

The Health Resources and Services Administration (HRSA) was the source of information on community, migrant and homeless health centers. From HRSA's Bureau of Primary Care, data were collected via telephone on number of clinic sites, total clients and total budget. HRSA estimates that 700 organizations operate community and migrant health centers with 2000 separate clinic sites. Additionally, 119 grantees operate approximately 500 homeless health care clinics. Together, these programs serve 7.6 million clients annually and have operating budgets that total \$2.2 billion.

HCFA national accounts data were used to calculate the health center proportion of personal health care services. The base for determining the calculation was defined as total personal health care expenditures (\$782.5 billion) minus hospital care expenditures (\$326.6 billion), or \$455.9 billion. Health centers account for 0.5% of personal health care, after hospital care has been subtracted.

Penal System

Data on health care expenditures within the penal system were compiled from *The 1994 Corrections Yearbook*, a publication of the Criminal Justice Institute (CJI). According to CJI, there were 995,730 inmates at all levels of the U.S. correctional system on January 1, 1994. This included 892,270 inmates in state and federal prisons and 103,000 prisoners in local jails and other programs. From statistics submitted by 42 states, the District of Columbia and the federal correctional system, CJI derived a daily health care cost per inmate of \$5.90 for state and federal prisons. This translates to an annual health care cost of approximately \$2,154 per inmate and a total annual expenditure of \$1.921 billion.

The correctional system proportion of personal health care services was calculated using the same base as was used in the CHC calculation. Total health care expenditures for state and federal prisoners (\$1.921 billion) were divided by a base figure of \$455.9 billion to yield a value of 0.4%. The calculation does not include inmates in local jails. No figures were available on health care costs at this level of the correctional system. There is probably less care available at the local level and annual costs per inmate are probably lower. However, even if local inmates were included in the calculation at the same daily or annual rate as in state and federal prisons, the proportion would have increased by only 0.1% and would not have significantly altered the national calculation of \$1.921 billion.

ICF/MRs

The ICF/MR data were compiled from the *1994 Statistical Abstract*. Of the, 46,786 residential facilities for the mentally retarded in the United States in 1991, only 1,477 were identified as public and all were state operated. These public facilities served a total of 88,841 residents. With daily maintenance expenditures of \$193 per resident, total expenditures equal \$6.3 billion. Using the same baseline as was used for CHCs and the penal system, ICF/MR expenditures totaled 1.45% of personal health care services, after hospital care had been factored out.

FSS Effect

The projected increase in the dollar amount for medical equipment and supplies that would come under the proposed FSS extension was calculated using data from HIMA and GSA. HIMA projects that the U.S. domestic market for medical equipment and supplies will total \$51.3 billion in 1995 and that federal FSS users comprise 5% of this total. In dollar terms, the FSS share will be \$2.565 billion ($\$51.3 \text{ billion} \times 5\%$) or 47.5% of total annual FSS expenditures (\$2.565 billion/\$5.4 billion). Public facilities' portion of the health care market has been estimated at 12.3% (see above). If the FSS program is extended to 12.3% of the U.S. market for medical equipment and supplies, the total dollar amount that would be affected would be \$6.31 billion ($\$51.3 \text{ billion} \times 12.3\%$), an increase of \$3.745 over present levels. As previously noted, this projected total exceeds current annual FSS expenditures for all products and services.

(hima/estimate.fsa)



NATIONAL RETAIL FEDERATION

Comments of the
NATIONAL RETAIL FEDERATION
submitted for the record to the
COMMITTEE ON SMALL BUSINESS
U.S. HOUSE OF REPRESENTATIVE
on
H.R. 1670,
THE FEDERAL ACQUISITION REFORM ACT
OF 1995

August 17, 1995

The World's Largest Retail Trade Association



Liberty Place, 325 7th Street NW, Suite 1000
Washington, DC 20004
202.783.7971 Fax: 202.737.2849

The National Retail Federation (NRF), the nation's oldest and largest trade association representing the interests of the retail industry, hereby submits the following comments on H.R. 1670, the Federal Acquisition Reform Act of 1995. Of particular interest to the retail industry are efforts to repeal the expanded purchasing authority granted to the General Services Administration (GSA) by the 103rd Congress.

By way of background, the NRF is the world's largest retail trade association with membership that includes the leading department, specialty, discount, mass merchandise and independent stores, as well as 32 national and 50 state associations. NRF members represent an industry that encompasses over 1.4 million U.S. retail establishments, employs nearly 20 million people, 1 in 5 American workers, and registered 1994 sales of more than of \$2.2 trillion. NRF's international members operate stores in more than 50 nations.

During consideration of the Federal Acquisition Streamlining Act of 1994 (FASA) by the Senate Committee on Armed Services and the Senate Committee on Governmental Affairs in the 103rd Congress, an amendment was adopted to modify §1555 of FASA to permit GSA to act as purchasing agent for state and municipal governments. Through this arrangement, state and local governments will be able to utilize GSA purchasing schedules for their acquisitions.

While NRF supports efforts to create a more efficient federal acquisition process through FASA, the extension of GSA purchasing schedules to state and local governments under §1555 represents an unwarranted extension of federal activities into the private marketplace. Further, it is unlikely that municipal governments will realize any meaningful benefits and its impact on local economies could be highly adverse.

Of primary importance to the retail industry and small businesses are concerns that, as state and local governments begin to utilize GSA schedules, widely accepted and "traditional" private sector channels of supply for municipal governments will be irrevocably disrupted. The adverse impact this will have on the local business community cannot be understated. Many businesses, especially smaller, family-owned retailers, rely on sales to governments for their financial well-being. The loss of these sales, which will occur as the channels of supply are potentially shifted from private sector sources to sources within the federal government, may prove too damaging for many small businesses to bear. In their zeal to "streamline" government acquisition through §1555 of FASA, the 103rd Congress inadvertently adopted legislation which may cause tremendous hardships for many businesses throughout the country. As businesses suffer from the lack of government purchasing, so to will local communities. The reduction in government purchasing from local businesses will result in increased unemployment, fewer taxes collected, and an overall decline in the local economy.

Regrettably, expanded GSA purchasing authority is not limited to just a few specific items. Under GSA proposed regulations to implement §1555, published in the Federal Register on April 7, 1995 (60 Fed. Reg. 17764), state and local governments will be permitted to utilize GSA purchasing schedules covering a broad range of items from office furniture, maintenance equipment, medical equipment, school supplies and tractors, to name but a few. Hence, the possible damage to the small business community may be spread over a wide variety of businesses. GSA is required to promulgate a final rule on this issue no later than October 1, 1995.

As stated previously, NRF supports efforts to create a more efficient government acquisition process. However, in addition to the potential damage

caused by §1555 of FASA to the private sector, state and local governments may well not realize significant financial savings and may experience a decrease in the level of service they have come to expect from private sector businesses.

For state and local governments, it is unlikely that FASA will ever result in significant savings. Under the GSA proposal, GSA will be allowed to charge municipal governments an unspecified "fee" for the use of their purchasing schedules. This fact, coupled with the fact that many state and local governments already conduct purchasing on a competitive bid basis (accepting the lowest bid), all but ensures that the adoption of §1555 will provide minimal, if any, savings for state and local governments. Further, the bureaucratic costs incurred by the federal government in administering the GSA program are expected to be significant. It is estimated that the use of GSA purchasing schedules will cost the federal government \$1.35 billion annually, or \$11.3 billion over seven years, in the medical equipment field alone.

In addition to failing to realize any meaningful savings from the implementation of FASA, state and local governments will also experience a marked reduction in the level and quality of service they receive from their purchases. Many of the items covered under the GSA schedules, such as medical equipment, tractors, and telecommunications equipment, require regular maintenance, alignment, tuning or the like. Under the current system, local businesses who sell to governments have often developed close working relationships with their government customers and take pride in providing superior customer service. It is unlikely that a federal agency such as GSA, which sources from hundreds of suppliers located throughout the country, will be able to assure municipal governments that GSA suppliers will be capable of providing these services to governments at a similarly high level.

In light of the deficiencies of FASA illustrated above, some would argue that state and local governments will opt to continue traditional purchasing systems and not utilize GSA schedules. This assumption is far from certain. Strict purchasing requirements will, in many cases, dictate that GSA schedules be used. Under certain circumstances, slight "paper" savings in cost to municipal governments will force the adoption of GSA schedules. Even if the transition to GSA purchasing by local governments is slow, it will nonetheless gradually erode the business foundations of many communities.

In this age of reducing the size and scope of the federal government, it is ironic that §1555 of FASA, which will extend the General Services Administration's bureaucracy into virtually every city, town, and county throughout the country, should be adopted. The repeal of §1555 is essential to ensure the well-being of the many small businesses which are the backbone of numerous American communities.

Many Members of the 104th Congress recognize the inherent deficiencies of §1555. Rep. Bill Zeff (R-NH) recently offered an amendment (which was ultimately withdrawn) to H.R. 1670 which would repeal §1555. H.R. 1670 is an ideal vehicle for the repeal of §1555 of FASA. Repeal of §1555 will benefit the business community, the federal government, and the state and local governments it was originally enacted to aid. On behalf of the retail industry, NRF strongly urges lawmakers to support Congressional efforts to repeal GSA's misguided purchasing authority as granted under §1555 of FASA.

July 27, 1995

The Honorable William F. Clinger, Jr.
Chairman
Committee on Government Reform and Oversight
U.S. House of Representatives
Washington, DC 20515-6143

Dear Mr. Chairman:

On Monday, July 24th, we learned that H.R. 1670, the "Federal Acquisition Reform Act of 1995", had been scheduled for mark-up on Thursday, July 27th. While we understand that proposed revisions to all four titles of the bill have been prepared, our comments are directed primarily to our substantial concerns with Title I (Competition), as reflected in a July 19th draft obtained by the staff of the House Committee on Small Business on July 25th.

Reiterating testimony presented to the House Committee on Small Business at its June 29th hearing, we believe that it is essential that H.R. 1670 be modified to maintain the current standard of "full and open competition", established by the landmark Competition in Contracting Act of 1984 (CICA). CICA unambiguously expressed the policy that competition is to be the norm for Federal contracting, established statutory standards for the circumstances under which other than competitive procedures are justifiable, and prescribed a rigorous but workable justification and approval system for establishing whether a proposed other than competitive procurement met those statutory standards. The competitive system established by CICA has proven itself for a decade, resulting in a steady decrease in sole source contract awards. It assures a fair and open procurement process, which is essential to small business.

We are perplexed by a theme reflected in so many of the bill's provisions -- eliminating clear statutory standards and substituting virtually unfettered discretion in the career regulation writers to shape the procurement system as they see fit. This approach is contrary to the strong regulatory reform initiatives embraced by the House and strongly supported by the small business community. These initiatives call for restraining the discretion of the career regulatory bureaucracy by establishing precise statutory standards, such as cost-benefit analysis, and effective means to ensure compliance. Clear statutory standards, and an effective protest system, are just as appropriate in the procurement arena.

We don't believe that any case has been made for modifying the standard and practice of "full and open" competition. We are unaware of any testimony or study that such a change is needed. On the contrary, it was specifically considered and rejected by Advisory Panel on Codifying and Streamlining Acquisition Laws, whose 1,800-page report was the foundation for P.L. 103-355, the "Federal Acquisition Streamlining Act of 1994" (FASA).

Similarly, we don't believe that any case has been made for repealing the statutory provisions that assure open and fair bidder pre-qualification systems. They, too, have met the needs of the procuring agencies, while protecting small firms from arbitrary exclusion. H.R. 1670's new Contractor Verification System simply lacks adequate statutory standards and confers too much discretion on the regulation writers, inviting a return to the abuses that prompted Congressional action during the mid-1980s as part of the response to the "spare parts horror stories".

We understand that Title II (Commercial Items) still authorizes the purchase of commercial items without any dollar limitation through "simplified procedures" previously used only for small purchases (\$25,000 or less). Further, we understand that the provision may give tacit recognition to sole-source procurements of commercial items using "simplified procedures", ceding to the regulation writers full discretion to shape a system for justification and approval without any Congressional standards whatsoever. If these descriptions are accurate, we must continue to oppose this provision of the bill.

Next, we understand that Title IV (Streamlining of Dispute Resolution) was substantially rewritten on the evening of July 25th in ways that could deny an aggrieved bidder a realistic opportunity to effectively protest improper agency action or receive a real remedy. If Title IV has been weakened, it would be unfortunate since a meaningful bid protest system is essential and the introduced bill proposed many useful improvements, such as the increased use of alternative disputes resolution techniques, long supported by the small business community.

We sincerely hope that many of the other positive provisions of the introduced bill have not been diminished in re-drafting. Of special importance to the small business community is Section 301 (Government Reliance on the Private Sector).

Mr. Chairman, while we recognize your desire to move steadily forward with another round of "fundamental" procurement reform, we earnestly urge additional moderation as to substance and schedule, for several reasons.

First, Government buyers and vendors of all sizes are just now comprehending the likely results of the sweeping changes made by FASA, as the implementing regulations are issued. Small businesses will be especially hard pressed.

At a July 20th hearing before the House Small Business Committee, the GAO testified that the regulation writers will simply not meet FASA's deadlines for the issuance of proposed and final regulations. Consequently, small firms can likely expect to see FASA become effective on October 1st, with only a few days to comprehend many of the new regulations. For the small business community, FASA was "fundamental" procurement reform. Small business government contractors need time to adapt, and in our opinion, Congress would benefit from reviewing some period of actual practice under the procurement practices mandated by FASA.

Next, the 1995 White House Conference was convened in Washington during June. Further changes to the Federal procurement process should consider the recommendations adopted.

While recognizing your strong record on behalf of small business, the undersigned organizations simply cannot express support for the "Federal Acquisition Reform Act of 1995" in the form in which we believe it currently exists.

Sincerely,

Small Business Working Group on Procurement Reform

On behalf of the following participating organizations --

Small Business Legislative Council (SBLC)
 National Small Business United (NSBU)
 National Association of Women Business Owners (NAWBO)
 Latin American Management Association (LAMA)
 Minority Business Enterprise Legal Defense
 and Education Fund (MBELDEF)
 National Association of Minority Business (NAMB)
 National Association of Minority Contractors (NAMC)
 Women Construction Owners and Executives
 American Gear Manufacturers Association

U.S. Chamber of Commerce

cc: The Honorable Cardiss Collins
Ranking Democratic Member
Committee on Government Reform and Oversight

The Honorable Jan Meyers
Chair
Committee on Small Business

The Honorable John J. LaFalce
Ranking Democratic Member
Committee on Small Business

The Honorable Floyd Spence
Chairman
Committee on National Security

The Honorable Ron Dellums
Ranking Democratic Member
Committee on National Security



Members of the Small Business Legislative Council

Air Conditioning Contractors of America
 Alliance for Affordable Health Care
 Alliance of Independent Store Owners and Professionals
 American Animal Hospital Association
 American Association of Equine Practitioners
 American Association of Nurserymen
 American Bus Association
 American Consulting Engineers Council
 American Council of Independent Laboratories
 American Gear Manufacturers Association
 American Machine Tool Distributors Association
 American Road & Transportation Builders Association
 American Society of Interior Designers
 American Society of Travel Agents, Inc.
 American Subcontractors Association
 American Textile Machinery Association
 American Trucking Associations, Inc.
 American Warehouse Association
 AMT-The Association for Manufacturing Technology
 Architectural Precast Association
 Associated Builders & Contractors
 Associated Equipment Distributors
 Associated Landscape Contractors of America
 Association of Small Business Development Centers
 Automotive Service Association
 Automotive Recyclers Association
 Automotive Warehouse Distributors Association
 Bowling Proprietors Association of America
 Building Service Contractors Association International
 Christian Booksellers Association
 Cincinnati Sign Supplies/Lamb and Co.
 Council of Fleet Specialists
 Council of Growing Companies
 Direct Selling Association
 Electronics Representatives Association
 Florists' Transworld Delivery Association
 Health Industry Representatives Association
 Helicopter Association International
 Independent Bankers Association of America
 Independent Medical Distributors Association
 International Association of Refrigerated Warehouses
 International Communications Industries Association
 International Formalwear Association
 International Television Association
 Machinery Dealers National Association
 Manufacturers Agents National Association
 Manufacturers Representatives of America, Inc.
 Mechanical Contractors Association of America, Inc.

National Association for the Self-Employed
 National Association of Catalog Showroom Merchandisers
 National Association of Home Builders
 National Association of Investment Companies
 National Association of Plumbing-Heating-Cooling Contractors
 National Association of Private Enterprise
 National Association of Realtors
 National Association of Retail Druggists
 National Association of RV Parks and Campgrounds
 National Association of Small Business Investment Companies
 National Association of the Remodeling Industry
 National Chimney Sweep Guild
 National Electrical Contractors Association
 National Electrical Manufacturers Representatives Association
 National Food Brokers Association
 National Independent Flag Dealers Association
 National Knitwear & Sportswear Association
 National Lumber & Building Material Dealers Association
 National Moving and Storage Association
 National Ornamental & Miscellaneous Metals Association
 National Paperbox Association
 National Shoe Retailers Association
 National Society of Public Accountants
 National Tire Dealers & Retreaders Association
 National Tooling and Machining Association
 National Tour Association
 National Venture Capital Association
 National Wood Flooring Association
 NATSO, Inc.
 Opticians Association of America
 Organization for the Protection and Advancement of Small Telephone Companies
 Passenger Vessel Association
 Petroleum Marketers Association of America
 Power Transmission Representatives Association
 Printing Industries of America, Inc.
 Professional Lawn Care Association of America
 Promotional Products Association International
 Retail Bakers of America
 Small Business Council of America, Inc.
 Small Business Exporters Association
 SMC/Pennsylvania Small Business Society of American Florists
 Turfgrass Producers International



July 27, 1995

The Honorable William F. Clinger, Jr.
 Chairman
 Committee on Government Reform and Oversight
 U.S. House of Representatives
 Washington, D.C. 20515

Dear Mr. Chairman:

We recently learned the Committee on Government Reform and Oversight will today be considering the Federal Acquisition Reform Act of 1995 (H.R. 1670). Associated Builders and Contractors (ABC) would like to take this opportunity to address the proposed revisions to Title I of the legislation. While ABC supports the Committee's efforts to reform the costly and inefficient practices of the federal procurement system, it is critical that these efforts do not provide an opportunity to preclude fair competition for federal contracts by lessening the current standard of full and open competition.

ABC is a national trade association representing 17,500 contractors, subcontractors, material suppliers, and related firms from across the country and from all specialties in the construction industry. Although the majority of our membership is comprised of small businesses, we also represent some of the largest contractors in the world. This diverse membership is united in ABC through a shared commitment to the merit shop philosophy of awarding construction contracts to the lowest responsible bidder -- regardless of labor affiliation -- through open and competitive bidding. This practice assures the taxpayer and the consumer the best possible job for the dollar.

ABC appreciates the Committee's willingness to address the concerns of the construction community and is pleased with the retention of the preference for competitive sealed bid procedures. However, ABC remains concerned that the bill would effectively lessen today's standard of competition. It is a basic tenant of the free market system that all sources be given the opportunity to compete for work. This includes open consideration for government construction contracts for all bidders -- large and small, old and new entrants into the federal market. ABC is fully supportive of the current full and open competitive process for construction contracting contained in current procurement law. It has adequately provided the construction contracting community with equal opportunities for participation in federal procurement programs as well as restricted the opportunity for partiality and abuse.

ABC appreciates your attention to the impact of H.R. 1670 on the nation's construction industry. I look forward to working with you to ensure that the bill will not lessen current equal and fair opportunities for competition in federal procurement as it moves forward to be considered by the full House of Representatives.

Sincerely,

Jennifer O. Boucher
 Washington Representative

1300 North Seventeenth Street ■ Rosslyn, Virginia 22209 ■ (703) 812-2000

Small Business Working Group on Procurement Reform

Commentary on

**H.R.1670, the “Federal Acquisition Reform Act of 1995”
[as reported by the Committee on Government Reform and Oversight
on July 27, 1995]**

Small Business Working Group on Procurement Reform

The Small Business Working Group on Procurement Reform is an informal coalition of associations that serve as advocates for small businesses, including small businesses owned by minorities and women. The list of associations that participate in the Small Business Working Group is attached.

The Small Business Working Group was formed during the consideration of the legislation that became the “Federal Acquisition Streamlining Act of 1994” (FASA), Public Law 103-355. The group’s basic objective was to see that the practical business needs of small government contractors were recognized. Procurement simplification and streamlining should not be exclusively for the benefit of Government buyers. Procurement reform legislation should not be the source of new barriers to small business participation, both at the prime contract and subcontract level. Unfortunately, such legislation can be the source of new obstacles, especially when Congress grants excessively broad discretion to the regulation writers.

Questionable Timing for Additional Major Legislation

Despite being in the midst of FASA’s implementation, the small business community is now confronted with a new proposal to “fundamentally” change the Federal procurement process, H.R. 1670, the “Federal Acquisition Reform Act of 1995”. The small business community remains deeply concerned with many of the provisions

of this bill, which was reported on July 27th, by the Committee on Government Reform and Oversight. In its current form, H.R. 1670 would be a source of new obstacles to small business participation in Federal contracting, and should not be enacted.

Our analysis of the provisions of the reported bill follows.

Title I - Competition

“Full and Open Competition”

Section 101 (Improvement of Competition Requirements) of the reported bill would fundamentally change the standard and practice of “full and open competition” established by the landmark Competition in Contracting Act of 1984 (CICA). The provision makes parallel amendments to section 2304 of title 10, which governs defense procurements, and to Section 303 of the Federal Property and Administrative Services Act of 1949 (Title 41), which governs the civilian agencies.

The proponents of H.R. 1670 assert that it maintains “full and open competition”. We would assert that the reported bill only maintains the use of the phrase “full and open competition”, while completely eliminating the current standard and practice. We believe that a simple comparison between the competitive practices imposed by CICA and those proposed by H.R. 1670 will support this position.

Statutory Exceptions to Competition Eliminated

CICA requires contracting agencies to use competitive procedures unless the use of “other than competitive procedures” can be justified against one of seven statutory exceptions. These seven exceptions recognize an array of circumstances in which obtaining competition is not possible. For example, the clearest situation is one in which there is only one source capable of meeting the Government’s needs. Another statutorily recognized situation in which competition requirements may legitimately be restricted is that in which disclosing the Government’s needs to other than a limited number of sources would compromise national security. CICA’s statutory exceptions to

competition are standards that have proven themselves for a decade, simultaneously meeting the legitimate needs of the procuring agencies and acting as a necessary deterrent to non-competitive contracting.

"Justifications and Approvals"

CICA requires that the use of other than competitive procedures must be justified and establishes clear requirements for the approval of such noncompetitive contract awards. Level of approval is geared to the dollar value of the contract proposed for award on a non-competitive basis. Based upon a decade of experience, Congress has periodically adjusted the level of the approval to minimize delay, but still maintain accountability. CICA also specifies minimum standards for the documentation needed to support a contracting officer's decision to use other than competitive procedures. Again, a decade of experience has proven that the current statutory requirements regarding such Justifications and Approvals (J&As) are effective in deterring unwarranted sole-source contract awards.

Limitless Discretion for Non-competitive Contracting

In contrast to CICA's seven statutory exceptions authorizing the use of other than competitive procedures, H.R. 1670 would authorize the use of other than competitive procedures under two new and essentially unlimited exceptions to competition. Under H.R. 1670's proposed standard, the use of competitive procedures could be avoided if the buying activity determined that the use of competitive procedures is not "feasible" or "appropriate." H.R. 1670 provides no statutory standard regarding either new exception. It merely directs that the use of these new exceptions shall be specified in the Government-wide Federal Acquisition Regulation (FAR). Essentially, this provision of H.R. 1670 grants a statutory "blank check" to the regulation writers to authorize non-competitive contract awards. In our opinion, enactment of this provision would set-back the procurement process to the predominantly non-competitive environment of the 1970s that prompted Congress to enact CICA.

H.R. 1670 would also convert CICA's seven statutory exceptions to competition to illustrative situations to be included in the FAR coverage relating to the use of other than competitive procedures. It is important to note that H.R. 1670 makes explicit that the regulation writers are free to add other exceptions to the seven drawn from current statutory exceptions to competition.

Statutory "Justification and Approval" Process Repealed

H.R. 1670 would also eliminate the current statutory system for justifications and approvals (J&As), previously described, and substitute a requirement for the regulation writers to develop appropriate FAR coverage relating to the same subject. Again, no statutory standards are provided. Essentially, the regulation writers are granted another "blank check".

We believe that the current statutory standards for the J&A process have worked well, and should not be repealed. They require the conduct of a business-like decision process and assure that essential elements of information are available upon which to judge the appropriateness of the contracting officer's decision to award a contract using other than competitive procedures.

Additional Qualifier on Competitive Contracting

H.R. 1670 further conditions CICA's unequivocal statutory preference for competition in contracting by saying that the use competitive procedures must be "consistent with the need to efficiently fulfill the government's requirements". It is our view that the Government's description of its need, the supplies or services intended to be purchased, is what should be "consistent with the need to efficiently fulfill the Government's requirements". Having defined how to most efficiently meet the Government's need, then competitive procedures should be required, as they are today, for making the necessary purchase.

Simply put, we believe that "full and open competition" should continue to be the Congressionally-recognized norm for Government contracting. It cannot, if the existing standards and procedures enforcing adherence to that norm, are repealed.

Definitional Changes - "Open Access"

Section 103 of the bill alters key definitions relating to the "full and open competition" standard, that are found within the Office of Federal Procurement Policy (OFPP) Act.

First, H.R. 1670 establishes a new term "open access". It is our understanding that the sponsors have included this new term to demonstrate their intent that the bill's new standard for competition emphasizes the openness that is a core objective of CICA's "full and open competition" standard. The bill's definition of "open access" is the current definition for "full and open competition" -- that is, "all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement". This definitional change has left the term "full and open competition" undefined, although H.R. 1670 continues to make use of the term. When analyzed in the context of the drastic changes to the current practice of "full and open competition", previously described, we believe that the definitional changes will only make it more likely that the regulation writers will take this opportunity to erect insurmountable barriers to participation of small firms in the Federal procurement process.

Definitional Changes - "Competitive Procedures"

H.R. 1670 also makes very significant changes to the current definition of "competitive procedures." Under current law, "competitive procedures" means "procedures under which an agency enters into a contract pursuant to full and open competition". Under H.R. 1670, "competitive procedures" means "procedures under which an agency enters into a contract pursuant to full and open competition that provides open access and is consistent with the need to efficiently fulfill the government's requirements".

As was previously noted, “full and open competition” would become an undefined term under H.R. 1670. Further, the proposed definitional change to “competitive procedures” would allow the level of competition to be restricted “consistent with the need to fulfill the government’s requirements”. Proponents of the change emphasize that the competitive procedures must provide for “open access”, that is, “all responsible sources are permitted to submit sealed bids or competitive proposals on the procurement”.

Given the statutory words, both interpretations seem to have merit. The final decisions regarding the operative meaning of “competitive procedures” then will be left to the career regulation writers drafting the implementing FAR coverage. In our opinion, this is yet another “blank check”.

Increased Threshold for “Posting” of Contract Opportunities

Small business concerns must have timely access to adequate information about Federal contracting opportunities, if CICA’s competition requirements are to have any meaning in practical terms. Contracting opportunities below the small purchase threshold have always presented a challenge to small firms. Contracting opportunities below the small purchase threshold are exempt from the requirements of the Small Business Act (and the OFPP Act) which specify that such opportunities be announced in the *Commerce Business Daily* 15 days prior to the release of the solicitation, and that the solicitation provide each prospective offeror 30 days to fashion and submit its offer in response to the solicitation (45 days in the case of a contracting opportunity for research and development, which usually require the preparation of more complex proposals).

When CICA was enacted in 1984, the small purchase threshold was \$10,000. In 1986, the small purchase threshold was increased to \$25,000. At the same time, the Congress required ten-days of “posting” by the local contracting office to provide to the small business community some visibility of higher dollar value “small purchases”.

Specifically, posting is required for contracting opportunities greater than \$5,000 but less than \$25,000 if offered by the Department of Defense, and greater than \$10,000 but less than \$10,000 if offered by a civilian agency. These specific posting thresholds were adopted because they were already applicable to DOD and the civilian agencies in 1986 by FAR coverage. When FASA was enacted, the small business community fully anticipated that announcement of these contracting opportunities through such local posting would be replaced by electronic solicitation and award through FACNET (Federal Acquisition Computer Network).

H.R. 1670 adopts an Administration proposal to establish a "uniform" posting threshold, at \$10,000, below which a contracting office would no longer have announce contracting opportunities through local posting for at least a 10-day period. Obviously, this would deny small firms access to the thousands upon thousands of contracting opportunities offered by DOD with an anticipated award value of between \$5,000 and \$10,000. Those contracting opportunities would simply become invisible. Their exclusion from the posting requirement would also remove a principal incentive for announcing these contract opportunities in the future through FACNET. They would now be subject to the preferred method of solicitation (according to the FAR coverage), telephonic solicitation.

If the posting threshold is to be altered and made uniform, we would urge that it be established at \$5,000. This would force the civilian agencies to provide small firms with knowledge of more of their contracting opportunities. It would also have the salutary affect of encouraging more effective implementation of FACNET. However, as suggested in the General Accounting Office's (GAO) testimony during the Committee's July 20th hearing on the implementation of FASA, full implementation of FACNET may be in jeopardy for the near term.

No Case Has Been Made to Abandon the Standard and Practice of “Full and Open Competition”

We believe that no case has been made for changing the standard and practice of “full and open competition”. No study of which we are aware has recommended such a change. In fact, the Advisory Panel on Streamlining and Codifying Acquisition Laws, the so-called Section 800 Panel, composed of recognized contracting experts from both Government and the private sector, specifically reviewed the issue of changing the existing competition standards and rejected making a recommendation for any such change.

The Section 800 Panel’s 1800-page report provided the analysis underpinning the legislation that ultimately became the Federal Acquisition Streamlining Act of 1994. Unfortunately, such an analytical effort does not appear to be available to support many of the provisions of H.R. 1670, particularly the provisions of Title I.

Further, to our knowledge, there has been no testimony recommending changes to the “full and open competition” standard, before any committee during this Congress or the previous Congress. In large measure, H.R. 1670’s proposal to eliminate the standard and practice of “full and open competition” was totally unexpected. Such a change is simply not necessary to address the problems frequently cited as the basis for H.R. 1670’s fundamental changes to existing contract competition practices.

The Problems Cited Don’t Substantiate the Changes Being Proposed

During the hearing before the Committee on Government Reform and Oversight on May 25, there was frequent mention of the practical objectives being sought from the enactment of H.R. 1670. One of the sponsors’ objectives was to try to create an environment that would avoid having firms enter contract competitions which they have no realistic chance of winning. The other frequently cited objective was to determine earlier in the evaluation process that a firm’s proposal simply is not the proposal that will be tapped as the winner.

These stated objectives are worthwhile because small firms, in particular, have no desire to expend scarce bid and proposal funds on government contract competitions that they believe are not likely to result in a contract award.

Small firms will make the business decision not to participate if they have adequate information to do so. Giving contracting officers broad authority to exclude firms which they believe would be non-competitive is the wrong answer. The authority to exclude a firm from participating in a competition must only be permitted when a buying activity has demonstrated such a limitation on full and open competition is needed and then accomplished through pre-qualification procedures that are open and fair.

During the hearing, there was also frequent discussion of the how beneficial it would be to Government and contractors if contracting officers were able to earlier exclude from further consideration those proposals that have no realistic chance of being awarded the contract.

We agree. A small firm is interested in learning sooner rather than later that its proposal will not result in a contract award, when fairly measured against the proposals submitted by its competitors. Again, this will conserve limited resources available to such firms for marketing other contracting opportunities that have a higher probability of resulting in a contract award.

H.R. 1670 Offers the Wrong Solutions

Unfortunately, these laudable objectives became the basis for H.R. 1670's proposal to abandon the standard and practice of "full and open competition" and, as we shall describe later in this testimony, the equally unacceptable proposal to empower contracting officers to restrict firms from entering a competition.

The proponents of these provisions of H.R. 1670 say that we can no longer afford to have "competition for competition's sake". To our understanding, this was never an objective of the Competition in Contracting Act of 1984, given the workable array of statutory exceptions included along with the "full and open competition"

standard. Similarly, we don't believe that it has been demonstrated as the prevailing practice during the ten years that CICA has served as the foundation for the federal procurement process.

**Excessive Competition Is Not a Real Problem,
but Sole-source Contracting Is**

Excessive competition has never been factually demonstrated as a systemic problem with the procurement process. In sharp contrast, the GAO and Inspector General reports identifying examples of the persistent problem of unjustified sole-source contracting, and the associated increased Government costs, would probably fill several bookshelves.

**Alternative Solution - Better Description
of What the Government Want to Buy**

H.R. 1670 seeks to attain an agreed upon objective by flawed means. We believe that small firms will unilaterally avoid unwinnable contract completions, if they have adequate information to make an informed business decision. To provide access to such decisional information, the Federal buying activities need to expand their current practices of describing with more precision what product or service the agency is seeking to procure. The greater the exactitude and certitude with which the agency defines the subject matter of the contract to be awarded, the more likely it is that the pool of potential competitors will make an informed judgment on whether to participate.

Alternative Solution - Clearly Statement of Evaluation Factors

Second, we have long advocated that government contract solicitations should contain a fuller description of the evaluation factors to be used in selecting a winner. Progress has been very recently made with regard to this objective, particularly with respect to more solicitations more clearly expressing the importance of and

relationships between the various evaluation factors specified. FASA made further improvements in this regard, which we hope will be fully implemented in practice.

**Alternative Solution - Access to Information
about Other Prospective Competitors**

The third improvement that can be made to help firms make more informed judgments about entering competitions is to provide information about the identity of the other potential competitors.

By knowing which other firms may have requested a copy of the solicitation, a firm is in a better position to judge its relative position in the subsequent competition, further helping the firm to make a more informed business judgment to submit a proposal.

Currently, agencies deny firms access to information concerning other prospective offerors. In the implementation of the so-called 1986 Procurement Integrity Act, release of such information has been deemed to be prohibited.

It has always seemed improbable that having knowledge of the mere identity of other potential offerors (in contrast to their proposals) could prejudice the conduct of the competition among those firms that ultimately chose to submit a proposal. One of the positive features of H.R. 1670, contained in Title III, are proposed amendments to the Procurement Integrity provision of the OFPP Act. Among other things, they would refocus the statute's implementation on abuses more directly impacting the fair conduct of federal procurements.

Rather than empowering contracting officers to exclude prospective competitors, we would urge providing them access to the information needed to make more informed business decisions to enter Federal contract competitions.

Alternative Solutions - Explicit Authority for Contracting Officers to Make Early "Cuts" in the Competition

For example, we believe current law already permits contracting officers to establish what might be described as an "initial competitive range" based upon an evaluation of the offers submitted. Only those falling within this competitive range would be permitted to continue further in the competition. Since contracting officers maintain that they are unwilling to undertake such action for fear of bid protests, we would suggest that the authority to establish such preliminary "cuts" could be made more explicit by the legislation, thus providing greater "cover" to contracting officers.

Debriefings Are An Essential Element of the Process

In screening-out unsuccessful proposals earlier in the evaluation process, it is important that a firm be accorded a right to a debriefing. Such debriefings help the firm to better understand the reasons why its proposal was deemed unlikely to result in a contract award, avoiding bid protests. Debriefing also enables the firm to identify its weaknesses, potentially making the firm a better competitor in subsequent competitions.

It should be noted that unsuccessful competitors were only recently accorded a right to a debriefing with the 1994 enactment of FASA. It is one of the most notable examples of the improvements made by FASA to the competition process for contracts above the Simplified Acquisition Threshold.

Section 104 of H.R. 1670 continues the theme of according debriefings to those excluded from a competition prior to award, but unfortunately accords excessive discretion to a contracting officer to deny a request for a debriefing. It is unfortunate that the bill's provision falls short of according a clear right to an offeror excluded from a competition.

Title I -- Other Provisions

Elimination of Fee Limitations

Section 105 of H.R. 1670 amends both Section 2306 of Title 10 and the corresponding provision of the Federal Property and Administrative Services Act of 1949 (Section 304) to eliminate a series of statutory eliminations on the amount of fee that can be paid to a contractor under various types of service contracts.

Currently, a contractor performing a cost-plus-fixed fee contract for experimental, developmental, or research work may not be paid a fee that represents more than 15 percent of the estimated cost of the contract. The fee for performing a cost-plus-fixed fee contract for architectural or engineering services may not exceed 6 percent of the estimated cost of the project. The fee for performing any other type of cost-plus-fixed fee contract is limited to 10 percent of the estimated cost of the contract.

The elimination of these statutory fee limitations, especially that related to architectural-engineering services, has long been sought by associations representing the design and engineering professions.

Contractor Verification System - Excessive Discretion for Excluding Small Contractors

Section 106 (Contractor Performance) of H.R. 1670 would add a new section 35 to the Office of Federal Procurement Policy Act, establishing a new contractor prequalification system. It would also repeal the existing contractor prequalification systems found in section 2319 of Title 10 and the parallel provisions in section 303C of Title 41.

The current contractor prequalification provisions were enacted during the mid-1980s as part of the Congressional responses to the spare parts horror stories at DoD and elsewhere in Government. They were included to prevent the arbitrary exclusion of small manufacturers that were seeking to compete for spare parts contracts that had previously been procured exclusively on a sole- source basis. These provisions allow

buying activities to establish "Qualified Bidders List," "Qualified Manufacturers Lists," and similar lists of prequalified offerors when they are needed. To prevent abuse, the statutes set out clear standards. First, agencies are required to demonstrate the need for establishing such a restriction on full and open competition. Second, these statutes require that the agencies clearly state the qualifications standards that a firm must meet. Third, these statutes make explicit that any firm must be given the opportunity to demonstrate its ability to meet the qualification standards. Fourth, these qualification standards focus on measuring the objective technical capabilities of a firm to do the work required by the agency establishing the prequalification requirement.

In contrast, the contractor verification system established by H.R. 1670 lacks many of these statutory safeguards. Rather, it accords to the regulation writers broad discretion on when contracting officers may limit competitions to such "verified" contractors. The provision also grants broad discretion to the regulation writers regarding the termination of a contractor's status as a verified contractor. As currently written, the provision only assures that "a contractor whose verification is terminated or revoked will have a fair opportunity to be considered for reentry into the verification system."

No Case Made That Existing Prequalification Procedures Have Not Worked

Again, we assert that no case has been made that the current systems for contractor prequalification have not been meeting the needs of the procurement agencies, while providing appropriate protections to contractors, especially small contractors, from arbitrary treatment by contracting officers. In questioning the workability of the new proposed Contractor Verification System, we would particularly cite its reliance upon being able to obtain timely, accurate, and complete data concerning a firm's past performance. Although FASA calls for the establishment of systems for the collection of past performance data and its use in evaluating

contractors for the award of individual contracts, these systems are still under development and have not been tested in practice. The pilot programs of various Federal agencies that have sought to use past performance as an evaluation factor in the award of contracts have thus far been fairly limited and agency specific in measuring past performance. These pilot programs have generally lacked an effective means of measuring a firm's past performance outside of the federal government arena and especially its performance in the private commercial marketplace. This represents a particularly serious deficiency since one of the basic objectives of FASA was to bring more commercial firms into the government marketplace. It seems to us to be wholly inappropriate, given the status of implementation of the FASA provisions, to be actively considering a further expansion of the use of past performance in the federal procurement process. Denying a firm the opportunity to compete on the basis of a past performance evaluation, as proposed in H.R. 1670's Contractor Verification System, is unacceptable until there has been successful experience with systems that accurately collect, verify, and disseminate past performance data. One need only look at the difficulties afflicting the collection and reporting individual credit information to understand the significant challenges that will face government managers as they seek to use past performance data in a manner that assures fairness and accuracy.

Title II - Commercial Items

Title II of H.R. 1670 contains four sections which the authors believe are necessary to facilitate the acquisition of commercial items on a broader scale by the federal government. These provisions make a series of amendments to provisions adopted only last year in FASA . As we have noted earlier, the regulations implementing FASA have not yet been finalized or put into practice.

Using Simplified Procedures to Purchase “Commercial Products”, Without Dollar Limitation

Section 202 of the bill would specifically authorize the use of simplified procedures for the acquisition of commercial items without any dollar limitation. We believe that this authority is completely unacceptable.

The simplified procedures set forth in the Federal Acquisition Regulation were first adopted when the Small Purchase Threshold was \$10,000. FASA increased the Small Purchase Threshold to \$100,000, and redesignated it as the Simplified Acquisition Threshold (SAT). However, the regulations implementing the new SAT left the existing FAR coverage essentially unchanged. Further, FASA's definition of commercial item is exceedingly broad, permitting the recognition of an item as a “commercial item” even though it has not as yet been sold in the commercial marketplace. In fact, an item which an offeror merely intends to offer for sale in the commercial marketplace meets FASA's definition of a commercial item. Procurements of commercial items in excess of the \$100,000 SAT should be subject to the full and the full and open competition standard required of any other procurement exceeding the SAT.

Title III - Additional Procurement Reforms

Reliance on the Private Sector

Title III of H.R. 1670 includes an array of provisions touching upon matters affecting the conduct of the procurement process. Section 301 (Government reliance on the private sector) establishes an important statutory statement of congressional policy long sought by the small business community. The Small Business Working Group strongly supports this provision.

Limitation on Certification Requirements

Section 302 (Elimination of certain certification requirements) continues the efforts begun in FASA to diminish the number of contract certifications. This provision would prohibit an agency from imposing a non-statutory certification requirement.

We would caution, however, that the elimination of certification requirements that have a statutory basis can work to the detriment of small contractors. The argument that a certification is not needed when the contractor is bound to comply with the underlying statutory requirement sounds reasonable, but may not be practical. Small firms find it more difficult to keep track of the host of statutory requirements applicable to them. Certifications implementing such statutory requirements have the benefit of informing the small contractor of the statutorily-imposed requirement and putting the firm on notice to explore what its obligations are under the statute. Without such certification a small firm may remain ignorant of a statutory obligation which could then be applied against the firm during the course of the contract's administration.

Early Implementation of Authority to Waive Statutes in Testing Innovative Procurement Practices

Section 303 would authorize the Administrator for Federal Procurement Policy to utilize the authority granted by section 5061 of FASA to waive statutes as part of the authority to conduct tests of innovative procurement procedures.

The small business community remains vehemently opposed to extending authority to the OFPP Administrator to unilaterally waive statutory requirements. Section 15 of the Office of Federal Procurement Policy Act already grants the OFPP Administrator broad authority to conduct tests of innovative procedures, including the authority to waive any needed procurement regulations. However, the authority to waive statutes in support of such test programs requires the Administrator to obtain Congressional approval.

Over the vocal objections of the small business community, Congress granted such authority to waive statutes to the OFPP Administrator, but at least linked the exercise of such authority to the full implementation of FACNET on a government-wide basis. The linkage was done to focus the Administrator's attention on the full implementation on what could be, for small business, the most important improvement in the procurement process, the routine use of electronic commerce at all steps in the procurement process, from solicitation to payment. As reported to this Committee by the General Accounting Office on July 20th, the implementation of FACNET is woefully behind schedule and suffering from a lack of dedicated senior management attention.

The enactment of Section 303 of H.R. 1607 is opposed by the Small Business Working Group, since it would repeal the beneficial linkage established less than a year ago by the Congress.

Procurement Integrity

As noted earlier, Section 305 substantially re-writes the procurement integrity provisions of the Office of Federal Procurement Policy Act. If properly implemented, we believe that these changes could result in more beneficial communications between the government and its prospective customers when the agency is attempting to define how to meet its need and to assess the capabilities of the private sector to respond with cost effective proposals in a resulting competitive procurement. Fostering such communication between industry and government prior to the initiation of an individual procurement action is long over due.

Amendments to OFPP Act

Section 306, (Further Acquisition Streamlining Provisions) makes a series of amendments to the Office of Federal Procurement Policy Act. While most are offered as amendments to eliminate obsolete provisions, we would urge further consideration be given to the repeal of Section 8, which requires OFPP to report on its activities to the Congress. We would also suggest that Section 2 of the Act (Declaration of Policy) and

Section 3 (Findings and Purposes), while not operative law, contain statements about how the process should be conducted that are as appropriate today as when they were first enacted in 1975.

Improving Performance on DOD Major Systems

Sections 307 (Justification of Major Defense Acquisition Programs Not Meeting Goals) is a provision that holds the most promise for deriving substantial dollar savings from H.R. 1670. Section 307 would require that major acquisition programs in the Department of Defense perform on schedule and on budget, or pay budgetary consequences. In our view, the savings that can be derived from improved administration of such major programs, both in Defense and in the civilian agencies, will dwarf any savings that some have asserted could be derived from limiting competition.

Procurement Workforce Improvements

Section 308 (Enhanced Performance Incentives for the Acquisition Workforce) touches upon a key issue in improving the procurement process as we know it today. That is, improving the performance of the public servants charged with its management. It is essential that good performance be rewarded, but it is equally important that poor performance be penalized. Many of the complaints that small government contractors lodge against the procurement process are not based on the absence of discretion available to contracting officers, but rather contracting officers' failure to make prompt, judicious, and fair use of the very broad discretion already accorded to them by procurement law and implementing regulations.

Improved Program Management

Section 309 (Results Oriented Acquisition Program Cycle) seeks to reach the same objective as Section 307, that is, rewarding good program management performance and penalizing poor performance. Again, we would observe that this section, like Section 307, also holds significant promise for being a realistic source of substantial savings resulting from the reforms being proposed by this legislation.

Accelerating the Procurement Process

Section 310 (Rapid Contracting Goal) would add a new Section 36 (Rapid Contracting Goal) to the Office of Federal Procurement Policy Act. It would require the OFPP Administrator to establish a goal of reducing by 50 percent the time necessary for executive agencies to acquire an item for the user of that item. The small business community would urge that in implementing this broad standard, should it be enacted, the Administrator should focus on the delays caused by the executive agencies themselves in the solicitation, award, and administration of contracts. Our fear is that, in pursuing this goal, efforts will be renewed to diminish still further the time currently made available for the advance notice of contracting opportunities and the time provided for the preparation of offers.

In the past, these have always been the first target for efforts to accelerate the procurement process. When, in fact, much of the excessive time can be identified in the period between receipt of proposals from the private sector and the making of the award decision by the buying agency, and during contract administration action prior to commencement of performance.

Open-ended Liquidated Damages Provision

Section 312 (Contractor Share of Gains and Losses from Cost, Schedule, and Performance Experience) would add a new section 2306c to Title 10 and a corresponding new section 304D to Title 41. These new provisions would direct that the FAR be modified to provide for authority to penalize a contractor for "failing to adhere to cost, schedule, or performance parameters to the detriment of the United States". This new performance provision seems to broadly extend the authority of the government to impose liquidated damages on a non-performing contractor. It is essential that the FAR coverage implementing this provision, if enacted, make absolutely clear, as part of the solicitation, any potential penalties to which the contractor may be exposing itself if awarded the contract.

Prompt Payment

Section 314 (Improved Department of Defense Contract Payment Procedures) requires the General Accounting Office to conduct a review of commercial practices regarding accounts payable and, based upon such review, to develop standards for the Secretary of Defense to consider using to improve DOD's contract payment procedures and financial management systems. The small business community would urge that, in conducting his review, the Comptroller General should be directed to recognize the Congressional standards for government contractor payments specified in the Prompt Payment Act, Office of Management Budget Circular A-125 (Prompt Payment), and FAR coverage implementing the Act and the Circular. Further, while serious financial management problems have been identified with regard to the Department of Defense and its payment of contractors, the small business community believes it would be highly inappropriate to have a separate contract payment procedures applicable uniquely to the Department of Defense. Government-wide standards for contractor payment procedures remain essential and the Prompt Payment Act is the statutory framework for any payment system that properly considers the needs of the small business community.

Title IV, Streamlining of Dispute Resolution

The Small Business Working Group believes that an effective bid protest process is vital to sustain the standard and practice of "full and open competition". As reported, Title IV is a mere shadow of the provisions contained in the introduced bill. The now barely provides an aggrieved bidder a realistic opportunity to effectively protest improper agency action regarding the solicitation or award of a contract, or to receive a real remedy, if the protest is sustained.

Small Business Working Group on Procurement Reform

A broad coalition of small business associations working to foster small business participation in Government contracting opportunities.

American Gear Manufacturers Association (AGMA)
Latin American Management Association (LAMA)
Minority Business Enterprise Legal Defense and Education Fund (MBELDEF)
National Association of Minority Business (NAMB)
National Association of Minority Contractors (NAMC)
National Association of Women Business Owners (NAWBO)
National Center for American Indian Enterprise Development
National Indian Business Association (NIBA)
National Minority Supplier Development Council (NMSDC)
National Small Business United (NSBU)
Small Business Legislative Council (SBLC)
Women Construction Owners & Executives, USA (WCOE)



AMERICAN BAR ASSOCIATION

Section of Public Contract Law
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October 19, 1995

The Honorable Jan Meyers
Chair
Committee on Small Business
U.S. House of Representatives
Washington, D.C. 20515-6315

Re: Acquisition Reform
H.R. 1670; S. 946

Dear Mrs. Meyers:

Enclosed please find the comments of the American Bar Association, Section of Public Contract Law concerning certain acquisition reform proposals currently under consideration. The comments involve the competition and bid protest proposals contained in H.R. 1670 and the bid protest provisions of S. 946, as incorporated in the Senate version of the Defense Authorization Bill. The comments are presented on behalf of the Section of Public Contract Law. They have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly should not be construed as representing the position of the Association.

The Section of Public Contract Law is the only national organization which consists of attorneys and associated professionals in private practice, industry and Government service. The Section's governing council and substantive committees contain a balance of members representing these three segments, to ensure that all points of view are considered. In this manner, consistent with its mission statement, the Section seeks to improve public procurement by contributing to developments in procurement legislation and regulations, by objectively and fairly evaluating such developments; by communicating the Section's evaluations, critiques and concerns to policy makers and Government officials; and by sharing these communications with Section members and the public.

1995-1996

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These comments are presented in a short form, bullet version, and in a longer form discussion. The comments relate only to the competition and bid protest aspects of the pending legislation. The Section has expressed a position on the competition provisions. However, no position is expressed on the bid protest provisions -- instead, the Section has set forth comments on both sides of the issues raised by the legislation.

We appreciate the opportunity to submit these comments and are available to assist further if you so desire.

Sincerely,

A handwritten signature in dark ink, appearing to read "Frank H. Menaker, Jr.", with a stylized flourish at the end.

Frank H. Menaker, Jr.
Chair

Enclosures

October 6, 1995

Summary of
Comments of the Section of Public Contract Law
on H.R. 1670 and S. 946
Concerning Competition and Bid Protests

The Competition Standard

- No change should be made to the current statutory full and open competition standard at this time. The question of what constitutes full and open competition sufficient to protect the Government and the taxpayers' interests is complex and requires careful examination before changes are made. The Section will put forward a group to study these issues more thoroughly.

An Efficient and Effective Protest System

I. Background and Pending Legislation.

- On May 25, 1995, the Section presented a package proposal to improve and simplify the bid protest process. The Section's package best addresses concerns about the current system without imposing restrictions that would permit unlawful actions to occur that jeopardize the integrity of the procurement process.

With respect to protest forums, the Section's May package did not take a position on where the administrative protest forum(s) should be located. Rather, the Section recommended that there be at least one administrative-type protest forum external to the procuring agency. Since the time of the Section's testimony, however, legislation has been introduced that raises the issue of where the bid protest forum should be located.

- The Section has *no position favoring a specific administrative protest forum*, we believe there are significant legal and practical problems that are created in making any changes to the structure of the current protest process. Many of the same factors that have produced the current structure also affect consideration of the proposed changes.

II. What Constitutes An Effective and Efficient Bid Protest Forum?

- An effective and efficient system for resolving protests is an essential feature of a procurement system that has as central concerns the fundamental integrity of the procurement process and ensuring the

economic benefits of fair competition. The bid protest remedy is the primary means of providing confidence to the taxpayer and to potential offerors that the source selection will be fair and regulations and laws will be followed. A cost effective bid protest mechanism promotes fairness, saves money, and enhances competition.

A. H.R. 1670 Raises the Issue of Two Tracks.

- In its May 1995 testimony, the Section stated its view that the standard and scope of review for bid protests should provide that the forum "may authorize discovery and/or hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost effective manner." This language subsequently was adopted in H.R. 1670. Because H.R. 1670, as passed by the House, establishes a threshold of \$30 million under which protests "shall be considered under simplified rules of procedure" with discovery "in writing only", the bill raises the question of different procedural tracks for different size protests.

There are competing objectives involved in considering the desirability of a two-track system and differing views about the effectiveness and efficiency of a two-track system. A two-track system can reduce discovery costs, but preserve the flexibility of a forum to provide discovery where it is necessary and deny discovery where it is not necessary. On the other hand, it channels cases into a particular track providing less process for some cases and more for others.

B. Two Tracks Limit Cost and Provide Flexibility.

- Recognizing that H.R. 1670 has created a two-track approach, some believe the bill could be improved and achieve the objectives of both keeping discovery costs down and according flexibility by use of a presumption rather than a rigid threshold (which is used by H.R. 1670) to separate the tracks.
- The two-track process with a presumption would be structured as follows:
 - A less intensive type (Track I) analogous to current GAO procedures providing only for written discovery, and precluding any right to a hearing except in unusual circumstances. The agency or the Protester could request and the forum could, for good cause shown, provide a hearing or

additional discovery if justified by the nature of the issues.

- A more intensive type (Track II) providing for a range of various discovery devices (written interrogatories, requests for admission, document requests, and depositions) as necessary. However, such discovery would be limited to the minimum necessary for cost effective and efficient resolution of the protest. The forum always would be able to scale back these procedures and decide a Track II case on written submissions.
 - Cases that qualify for Track II should be the larger dollar value and more complex cases, with the protester (or the agency) in these cases able to choose the more intensive track, subject to the forum determining that discovery and a hearing are not necessary.
 - The \$30 million threshold is viewed by some as too high and inappropriate given the number of cases in which hearings historically have actually been held. The threshold for more intensive discovery and a hearing should be at a reasonable level. (The GSBICA's statistics show that relatively few hearings are required (24 out of 69 merits decisions in 1993 and 21 out of 39 merits decisions in 1994). The GAO holds only 25-30 hearings per year.)
 - Further, the forum should retain discretion to provide the appropriate discovery and hearing procedures under either track, recognizing that even under Track II the discovery and hearing will be limited to that necessary to decide the issues that cannot otherwise be resolved on the written record.
- B. The Forum Should Determine the Nature and Extent of Discovery and Hearings.**
- Others believe that there is no clear reason for handling bid protests differently based on either the contract value or the subject matter of the procurement.
 - Imposing an arbitrary distinction between types of cases tends to polarize those who do not qualify for the "more intensive" discovery. Small businesses, which tend to compete for smaller dollar value contracts, may perceive a disadvantage if protests of larger dollar contracts are treated differently.

- The dollar value of a protested procurement does not necessarily reflect the complexity of the underlying source selection issues nor does it suggest whether or not factfinding beyond the written record is necessary. Having a dollar value threshold may on the one hand, invite an intensive discovery and adversarial process in protests above the threshold whether or not the circumstances warrant it. On the other hand, a threshold also may cut off discovery in cases where it is required due to document destruction or other problems.
- The forum should determine the nature and extent of discovery subject to the requirement that all discovery and hearings should be conducted to the minimum extent necessary.

III. Where Should An Administrative Protest Forum Be Located?

- There are four possible alternatives.
 - With increased assurance of adequate resources for the ASBCA, adopt the H.R. 1670 approach, which places all protest jurisdiction in two Boards of Contract Appeals with limitations on the use of formal judicial-type proceedings;
 - Retain the current system with GAO and the GSBICA (or another board or boards);
 - Place all protests at GAO, but strengthen GAO's authority to compel production of documents from third parties and to compel testimony;
 - Place all protest jurisdiction at the GAO and make no changes to GAO's authority.

In ideal circumstances, however, a new forum that is not burdened with the historical factors surrounding the development of the existing forums might well be preferable.

- To be effective, an administrative protest forum must be authoritative and independent. If a protest forum is perceived as lacking adequate authority and independence, it will be overlooked (e.g., existing agency protest procedures).

A. The H.R. 1670 Approach -- Two Boards.

- Two concerns have been expressed about the dual Board approach.
 - First, there is a belief in some quarters that the Boards may have an inherent tendency to "over judicialize" protests, particularly those protests which are transferred from the GAO - protests that currently most likely would be decided without a hearing.
 - Second, there is apprehension about the adequacy of resources accompanying the transfer of protests to the ASBCA, which is unaccustomed to handling such cases, and the prospect for unacceptable delays in both appeals and protest cases.

1. Concerns Regarding Judicialized Procedures.

With respect to possible "over judicialization" of protests, there are two differing views.

- Some believe that H.R. 1670 and existing Board procedures provide adequate protections as follows:
 - The standard and scope of review language of H.R. 1670 is essentially the language that the Section recommended. This language is an obvious adjustment to the current GSBICA protest statute which provides for "de novo" review in protests. This language clarified what some believe is already GSBICA practice, i.e., that formalistic procedures are not used unless necessary, and then to the minimum extent necessary.
 - The Boards of Contract Appeals already provide informal, expeditious, and inexpensive relief, most specifically under the accelerated and small claims expedited procedures required by the CDA.
 - Both Boards will inherit staff and resources from GAO. Since the vast majority of GAO's cases are handled in writing -- most cases will continue to be handled in the same manner, and by the same staff, as currently.
 - H.R. 1670 does require the Boards to provide ADR for protests -- if requested. ADR currently is not mandated for protests.
- In contrast, others believe that consolidation of Contract Disputes Act (CDA) jurisdiction with Competition in Contract Act bid protest jurisdiction is

inappropriate and combines processes that have two different objectives.

- Claims under the CDA involve adjudication of disputes between parties to a contract. The issues relate to contract administration and interpretation of the parties' contractual rights. A "de novo" review of the contracting agency's decision is seen as appropriate for such disputes.

2. Concerns Regarding Adequate Resources.

- The issue of adequate resources to handle protest cases at the ASBCA is of grave concern. Lack of resources would present a serious obstacle to implementation of the H.R. 1670 approach.
 - (a) If protest jurisdiction is added to the ASBCA, resources must be made available to assure that all cases, appeals and protests, can be processed in a timely manner. If Congress is not prepared to commit funding for adequate judges, staff and other resources, the two-Board approach will not work.
 - (b) If the H.R. 1670 approach were to be adopted, provision should be made for transferring resources between the Defense Board and the Civilian Board as necessary to accommodate workload shifts.
 - (c) The approach of H.R. 1670 in giving protests priority over claims may jeopardize timely processing of claims, however, separating contract disputes and protests into two separate divisions should assist in avoiding delays in the resolution of contract disputes or protests.

B. The Cohen Bill -- GAO As The Only Protest Forum.

- With respect to the Cohen Bill, these comments are limited to the bid protest issues only -- the Section is not providing comments on any other provision of the Cohen Bill at this time.
- The Cohen Bill transfers all administrative protest jurisdiction to the GAO under its current authority and makes no revisions to the GAO process.
 1. **GAO's Process Is Sufficient - Nothing Else is Necessary.**

- Some take the position that, if there is only one forum, it should be GAO, and that use of GAO's current procedures should properly be extended to all protests. Those with this view note that GAO provides relatively informal and inexpensive review by an entity that was not involved in the initial decision, has no stake in the outcome, and over which the procuring agency has no control. Further, they refer to the fact that nearly 3000 protesters each year opt to file protests with GAO rather than go to U.S. district court, indicating widespread confidence in GAO's system.

2. GAO's Current Process is Not Sufficient For Track II Type Cases.

- Many believe that if GAO were to be the only forum, additional statutory authority would have to be provided -- for cases that require additional evidence -- such as responses to interrogatories or compelled deposition/hearing testimony. Specifically, if the approach of centralizing all administrative protest jurisdiction in the GAO is adopted, the following additions to GAO's statutory authority are viewed by some as required to permit GAO to develop an adequate record for resolution of Track II type cases.
 - Subpoena authority to compel government agencies and third parties to answer interrogatories where information that is material to the case does not exist in a current document.
 - Subpoena authority to compel testimony from government and non-government personnel in depositions and hearings.
 - Subpoena authority to compel the production of documents by non-government organizations or individuals.
- Without such authority, GAO would continue to be dependent upon indirect devices such as the use of adverse inferences to secure testimony at GAO hearings. Further, without such authority, GAO is unable to compel information from parties who are not participating in the protest (for example, subcontractors and their employees, former government employees/military personnel, and former employees of participating offerors).
- There is some concern over whether GAO's status as a legislative branch agency might interfere with GAO's ability to use such new authority in practice. This

concern stems from the fact that historically the Department of Justice has from time to time, challenged GAO's authority on constitutional grounds. Courts have examined constitutional challenges to GAO's protest authority. In Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), the Court rejected a constitutional challenge to GAO's authority to alter the length of the period that the CICA stay provision was in effect. The Court concluded that GAO's actions were a valid exercise of Congress' authority to investigate procurement decisions. Id. at 1109-111; see also Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979, 995 (3rd. Cir. 1986) ("CICA is an exercise of Congress' power to investigate and its power to publicize and criticize the President's execution of existing legislation.").

- GAO should be able to exercise additional authority to obtain information. Some concern remains that DOJ would object to an enhanced GAO process. Of course, GAO's decision remains a recommendation.

IV. Suspension and Time for Decision.

A. Clarification of Time for Decision.

- Reducing the present CICA deadline for the GAO decision from 125 calendar days, and requiring decision in all protests within 85 calendar days.

B. Limit Suspension Override Authority to "Urgent and Compelling."

- In its May testimony the Section took the position that either standard (urgent and compelling or best interest) could be used, depending upon the level of the official making the decision.

1. Limit Override to Urgent and Compelling.

- Upon reflection, some view the H.R. 1670 approach using only urgent and compelling test, as more appropriate because the issue is whether the delay in performance is acceptable. Since the only issue is delay, it seems appropriate that the standard for override also be a temporal one -- urgency. The present alternative standard -- the best interests of the Government -- is viewed as too broad to prevent abuse. It has been found by some courts to allow so much discretion that agency decisions are immune from judicial review. See Topgallant Group, Inc. v. United States, 704 F. Supp. 265 (D.D.C. 1988).

2. Best Interests May Be Necessary.

- Others believe that the agencies may need to avail themselves of the best interest override in order to relieve time pressure on a procurement which, while important, may not rise to the level of "urgent and compelling." For some procurements considerations other than time may bear on an agency's decision, such as instances where efficient use of the agency's resources may require the procurement to proceed notwithstanding a protest. For these other instances, the "urgent and compelling" test is viewed as too stringent.

V. Equal Treatment for Frivolous Litigation Positions.

- The Section does not believe that either frivolous protests or frivolous government positions are a problem. However, in the event monetary sanctions are nevertheless considered a useful deterrent to frivolous litigation, some maintain that such sanctions should be available equally to all parties. Of course application of any sanctions would be in the discretion of the forum.

October 4, 1995

Comments of the Section of Public Contract Law
on H.R. 1670 and S. 946
Concerning Competition and Bid Protests

The Competition Standard

The Section has reviewed the proposed amendments to the full and open competition standard contained in H.R. 1670, the Federal Acquisition Reform Act of 1995, as introduced and as passed by the House on September 14, 1995. The bill as introduced proposed a "maximum practicable competition" standard. The bill as passed, maintains the statutory standard of full and open competition, but appears to qualify it by references to "open access" and "consistent with the need to efficiently fulfill the Government's requirements."

It is the Section's belief that no change should be made to the current statutory full and open competition standard at this time. The question of what constitutes full and open competition sufficient to protect the Government and the taxpayers' interests is complex and requires careful examination before changes are made. The Section believes that the changes proposed by H.R. 1670 will contribute to confusion and increase litigation, but without ultimately resolving the concerns at which the changes are aimed.

The Section is concerned that the changes to the competition standard proposed by H.R. 1670 will result in litigation that could take years to resolve. A case in point is the proposal in Section 106 for a Verified Contractor System. This provision apparently has been put forward as a partial response to the competitive range concerns. However, the Verified Contractor System raises many more questions than it answers. The proposed section 106 combines the concept of the current Qualified Products List ("QPL") process, where products are selected according to objective criteria, with past performance factors. It would establish a class of contractors eligible to compete at a given agency for property or services that are procured on a "recurring basis." There is no definition of "recurring," i.e. whether it applies to specific items (pens and paper clips) or a wide variety of products and services that the agency buys in five year awards (e.g. computer support services). The potential exists for a creation of a new procurement bureaucracy that would create a separate acquisition process for a virtually undefined new universe of products and services.

The Section believes that the question of effective and efficient competition requires further study and we are prepared to work with the Committee on Government Reform and Oversight to study the competition standard and to assess whether either statutory or regulatory changes are needed. For example, it is

possible that issues concerning over-inclusiveness of competitive range determinations could be resolved by a revision in the language of FAR 15.609 to remove the presumption.

The Section will put forward a group to work with the Committee to study these issues more thoroughly. At this time, however, we recommend no change to the statutory standard pending further study.

An Efficient and Effective Protest System

I. Background and Pending Legislation.

On May 25, 1995, the Section presented a package proposal (copy attached) to improve and simplify the bid protest process. The Section's package proposal set forth basic principles concerning: the standard and scope of review to be applied in protest cases; elimination of bid protest cost awards to successful protesters (except small business); authorization of sanctions for frivolous protests; and a revised process for obtaining and overriding a stay of the Government's authority to proceed with the procurement. The objective of this package was to strike a balance in order to achieve an efficient and effective bid protest process and remedy. We believe that the Section's package best addresses concerns about the current system without imposing restrictions that would permit unlawful actions to occur that jeopardize the integrity of the procurement process.

With respect to protest forums, the Section's May package did not take a position on where the administrative protest forum(s) should be located. Rather, the Section recommended that there be at least one administrative-type protest forum external to the procuring agency. Since the time of the Section's testimony, however, two new legislative proposals have been presented that raise the issue of where the bid protest forum should be located.

In lieu of the current protest process under which protests are handled at GAO and Information Technology ("IT") protests may be brought at the General Services Administration Board of Contract Appeals ("GSBCA"), the proposed legislation offers two divergent approaches. On the one hand, H.R. 1670, as passed by the House, authorizes two agency Boards of Contract Appeals, a Civilian Board and a Defense Board, both of which would have protest and contract disputes jurisdiction. As a result, the current protest jurisdiction of GAO would be discontinued and GAO's resources would be transferred to the Civilian and Defense Boards. Taking a very different tack, the Cohen Bill, S. 946, as added to the Defense Authorization Bill (S. 1026), abolishes the Brooks Act and, therefore, the GSBCA jurisdiction over IT

protests. Under the Cohen Bill, all administrative bid protest jurisdiction would be transferred to the GAO.

While the Section has no position favoring a specific approach, we believe there are significant legal and practical problems that are created in making any changes to the structure of the current protest process. Although the current process may appear somewhat cumbersome to one inexperienced in federal procurement, it has evolved over many years and there are historical and legal reasons for the current structure. Many of the same factors that have produced the current structure also affect consideration of the proposed changes.

II. What Constitutes An Effective and Efficient Bid Protest Forum?

An effective and efficient system for resolving protests is an essential feature of a procurement system that has as central concerns the fundamental integrity of the procurement process and ensuring the economic benefits of fair competition. The bid protest remedy is the primary means of providing confidence to the taxpayer and to potential offerors that the source selection will be fair and regulations and laws will be followed. Without that confidence, the public will have increasing concern about waste and abuse, and potential offerors will be reluctant to invest in bid and proposal efforts. In summary, a cost effective bid protest mechanism promotes fairness, saves money, and enhances competition.^{1/}

Currently, non-judicial protests are handled in two forums: the GAO and the GSBICA. Different procedures can be applied, depending on the forum. The GAO process decides the significant majority of cases based upon documents, affidavits, and written submissions. GAO considers all relevant documentary evidence, but does not usually take testimony (other than affidavits). GAO can require agencies to produce all documents related to a procurement, including those not maintained in the official file. In some cases (approximately 25-30 cases a year) GAO will convene a hearing for purposes of receiving oral unsworn testimony. GAO cases must be decided in 90 business days (125 calendar days under FASA).

^{1/} Some have questioned why a bid protest remedy is necessary at all when major corporations do not permit protests by their potential vendors. The answer is that the United States Government is legally bound to achieve full and open competition and to make selections in accordance with its published rules -- rules which have been determined to be in the interest of the taxpaying public. In the commercial world, with favored sources and strategic alliances, there are no such restrictions on source selection.

The GSBICA process (for ADP procurements) also requires submission of all documents related to the procurement pursuant to Board Rule 4 document production requests, and written interrogatories. If an order permitting depositions is issued (Rule 16), the Board may permit the various parties, including the Government, to depose key participants in the procurement. If necessary to resolve facts in dispute, the Board will conduct a hearing and receive sworn testimony on the disputed issues of fact. In 1994, the GSBICA issued 39 decisions on the merits out of 179 cases filed -- 21 of the decided cases involved a hearing. In 1993 the GSBICA decided 69 cases on the merits out of 287 cases filed -- of the 69 merits decisions, 24 involved a hearing.

In its May 1995 testimony, the Section stated its view that the standard and scope of review for bid protests should provide that the forum "may authorize discovery and/or hearings to the minimum extent necessary to resolve the issues raised in an expeditious and cost effective manner." This language subsequently was adopted in H.R. 1670. Because H.R. 1670 places all protest jurisdiction in the Civilian and Defense Boards by transferring GAO resources, and because H.R. 1670, as passed by the House, establishes a threshold of \$30 million (proposed § 214(g)) under which protests "shall be considered under simplified rules of procedure" with discovery "in writing only", the bill raises the question of different procedural tracks for different size protests.

There are competing objectives involved in considering the desirability of a two-track system in one forum (or in the case of the two Boards - one type of forum) and differing views about the effectiveness and efficiency of a two-track system. A two-track system can reduce discovery costs, but preserve the flexibility of a forum to provide discovery where it is necessary and deny discovery where it is not necessary. On the other hand, it channels cases into a particular track providing less process for some and more for others.

A. Two Tracks Limit Cost and Provide Flexibility.

Recognizing that H.R. 1670 has created a two-track approach, some believe the bill could be improved and achieve the objectives of both keeping discovery costs down and according flexibility by use of a presumption rather than a rigid threshold (which is used by H.R. 1670) to separate the tracks.

The two-track process with a presumption would be structured as follows:

- A less intensive type (Track I) analogous to current GAO procedures providing only for written discovery, and precluding any right to a hearing except in unusual

circumstances.^{2/} However, the Protester or the agency could request and the forum could, for good cause shown, provide a hearing or additional discovery if justified by the nature of the issues, for example bait and switch, conflict of interest, Procurement Integrity violations, or other material issues involving allegations of unequal treatment, which often involve facts not contained in the records of the procurement.

- A more intensive type (Track II) providing for a range of various discovery devices (written interrogatories, requests for admission, document requests, and depositions) as necessary. However, such discovery would be limited to the minimum necessary for cost effective and efficient resolution of the protest. A hearing would be held unless the protest could be resolved on "summary judgment" because no disputed issues of material fact remained after the discovery process. The hearing would be limited to material issues genuinely in dispute as determined through pre-hearing conferences and resolution of legal issues. Of course, the forum always would be able to scale back these procedures and decide a Track II case on written submissions.

Under this two-track system using a presumption, the availability of Track I would continue to provide the most inexpensive and expeditious of protest remedies. Such a system recognizes that discovery beyond written discovery is not necessary in many bid protests and that depositions can be inconvenient and costly for all parties involved. However, protests of larger dollar value procurements tend to be more complex (e.g., use formal source selection procedures) and generally justify more discovery.

Using this system with a presumption, the protester always should be able to choose Track I, but the agency and the protester will be able to request some discovery and a hearing if necessary for a proper development of the facts. Cases that qualify for Track II should be the larger dollar value and more complex cases, with the protester in these cases able to choose the more intensive track, subject to the forum determining that discovery and a hearing are not necessary.

To distinguish between cases qualifying for the less intensive or more intensive track, a presumption would be created

^{2/} In 1993 and 1994 GAO conducted hearings in approximately 25-30 cases out of approximately 720 cases decided on the merits each year. It is believed that most of those hearing cases would qualify for Track II.

that cases involving procurements with an expected value of less than a specified amount be processed under Track I, and that cases involving procurements valued at over that amount be processed under Track II procedures.^{1/} The selection of any threshold is somewhat arbitrary, but the rationale for limiting discovery is primarily a cost effectiveness argument.

For the reasons discussed below, some believe that the \$30 million threshold in H.R. 1670 may be too high. A threshold of \$10 million is viewed by some as more reasonable and as limiting opportunities for abuse. Under this two-track approach, while cases under \$10 million would not normally qualify for Track II procedures, cases over \$10 million would qualify for the Track II process. However, the forum would have the flexibility to increase the procedures in Track I for good cause, and the forum also would have the discretion to deny a protester the Track II procedures if discovery and a hearing were not necessary to resolve the case. This approach takes into account the fact that some larger dollar cases merit less discovery and other processes while other smaller dollar cases may sometimes require more. It avoids setting a rigid barrier and allows the forum discretion to tailor appropriate procedures for each case, but also guides lower value protests into a less intense proceeding.

Some view this two-track approach with a presumption as preferable to the rigid requirement now contained in H.R. 1670 which requires that cases under \$30 million must go to Track I. (Proposals apparently have been made suggesting a threshold of \$50 or \$100 million.) These thresholds are viewed by some as too high and inappropriate given the number of cases in which hearings historically have actually been held. The threshold for more intensive discovery and a hearing should be at a reasonable level. Further, the forum should retain discretion to provide the appropriate discovery and hearing procedures under either track, recognizing that even under Track II the discovery and hearing will be limited to that necessary to decide the issues that cannot otherwise be resolved on the written record. To create a rigid threshold or set it at too high a level also may unfairly disadvantage smaller companies.

It has been suggested that there is no need for a second track. However, some believe that the cost of protests with discovery and hearings is not so great as to justify elimination

^{1/} In post-award protests, the total evaluated price/cost of the awarded contract would be the test. To accommodate pre-award protests, the agencies should be required to publish in their RFPs a simple statement whether they expect the procurement to be worth the threshold dollar amount or more. That statement would be binding for purposes of establishing the presumption with respect to the available protest track.

of an important check on the integrity of the system for saving what amounts to a relatively few dollars and at the risk of far higher costs in waste, abusive procurement practices, and lost competition. The GSBICA's statistics show that relatively few hearings are required (24 out of 69 merits decisions in 1993 and 21 out of 39 merits decisions in 1994).^{4/} The GAO holds only 25-30 hearings per year. These cases, in total, involve just a few procurements, but they are procurements of considerable value in which issues involving serious violations of law have been raised.

B. The Forum Should Determine the Nature and Extent of Discovery and Hearings.

While some believe that a two-track system is a compromise, with a somewhat arbitrary threshold, others believe that there is no clear reason for handling bid protests differently based on either the contract value^{5/} or the subject matter of the procurement. The protest process should be informal, expedient and inexpensive for all parties. The protest process should be simplified. In all protests, discovery and hearings should be conducted to the minimum extent necessary.

Some believe that imposing an arbitrary distinction between types of cases tends to polarize those who do not qualify for the "more intensive" discovery. Small businesses, which tend to compete for smaller dollar value contracts, may perceive a disadvantage if protests of larger dollar contracts are treated differently.

Further, the dollar value of a protested procurement does not necessarily reflect the complexity of the underlying source selection issues nor does it suggest whether or not factfinding beyond the written record is necessary. Having a dollar value threshold may on the one hand, invite an intensive discovery and adversarial process in protests above the threshold whether or not the circumstances warrant it. On the other hand, a threshold also may cut off discovery in cases where it is required due to

^{4/} The current GSBICA process results in a number of voluntary dismissals. In 1994, 119 cases out of 179 filed were dismissed voluntarily (66%). In 1993, 190 cases were dismissed voluntarily out of 287 filed (66%).

^{5/} In the view of some, for pre-award protests, it may not be practical to differentiate based on contract value because the contract value is not known until award. It is possible that requiring the Government to state whether the procurement is expected to exceed a particular dollar amount will undermine the competitive process.

document destruction or other problems. Finally, if the objective is to streamline the process, the administration of a two track system may tend to complicate rather than simplify the protest process.

The forum should determine the nature and extent of discovery subject to the requirement that all discovery and hearings should be conducted to the minimum extent necessary.

III. Where Should An Administrative Protest Forum Be Located?

In view of the structure and history of the current administrative protest system, there are four possible alternatives.

- With increased assurance of adequate resources for the ASBCA, adopt the H.R. 1670 approach, which places all protest jurisdiction in two Boards of Contract Appeals with limitations on the use of formal judicial-type proceedings;
- Retain the current system with GAO and the GSBICA (or another board or boards);
- Place all protests at GAO, but strengthen GAO's authority to compel production of documents from third parties and to compel testimony;
- Place all protest jurisdiction at the GAO and make no changes to GAO's authority.

These four alternatives are derived from the existing protest and contract disputes forums and reflect the Section's judgment that, given the current Congressional environment with the emphasis on spending reductions and consolidation, a new forum for protests is probably not feasible. In ideal circumstances, however, a new forum that is not burdened with the historical factors surrounding the development of the existing forums might well be preferable.

To be effective, an administrative protest forum must be authoritative and independent. If a protest forum is perceived as lacking adequate authority and independence, it will be overlooked. This has been the experience regarding existing agency protest systems, which are sometimes used but more frequently avoided as disappointed bidders and offerors prefer to seek outside independent review. Accordingly, the legislative proposals to change the protest process by abolishing one forum or the other and replace it with a different process should be measured against this standard: Will the new process possess sufficient authority and independence to maintain credibility?

A. The H.R. 1670 Approach -- Two Boards.

As passed, H.R. 1670 provides authority for bid protests in two Boards of Contract Appeals. The Boards of Contract Appeals have achieved a long standing reputation for authoritative and independent resolution of contract disputes under the Contract Disputes Act.

Two concerns have been expressed about the dual Board approach. First, there is a belief in some quarters that the Boards may have an inherent tendency to "over judicialize" protests, particularly those protests which are transferred from the GAO - protests that currently most likely would be decided without a hearing. Second, there is apprehension about the adequacy of resources accompanying the transfer of protests to the ASBCA, which is unaccustomed to handling such cases, and the prospect for unacceptable delays in both appeals and protest cases.

1. Concerns Regarding Judicialized Procedures.

With respect to possible "over judicialization" of protests at the Boards, there are two differing views. On the one hand, some believe that H.R. 1670 and existing Board procedures provide adequate protections as follows:

- The standard and scope of review language of H.R. 1670 is essentially the language that the Section recommended.^{2/} This language is an obvious adjustment to the current GSBGA protest statute which provides for "de novo" review in protests. This language clarified what some believe is already GSBGA practice, i.e., that

^{2/} The language in section 424 is as follows:

(b) STANDARD OF REVIEW.--In deciding a protest, the Board concerned may consider all evidence that is relevant to the decision under protest.

(g) (1) PROCEEDINGS AND DISCOVERY.--The Board concerned shall conduct proceedings and allow such discovery to the minimum extent necessary for the expeditious fair and cost-effective resolution of the protest or to such affirmative defenses as the executive agency involved or any intervenor supporting the agency, may raise.

formalistic procedures are not used unless necessary, and then to the minimum extent necessary.^{2/}

- The Boards of Contract Appeals already provide informal, expeditious, and inexpensive relief, most specifically under the accelerated and small claims expedited procedures required by the CDA.^{3/} Cases processed under those procedures are required by the CDA to be decided "whenever possible" within specified time limits (180 days for accelerated cases; 120 days for expedited small claims cases), and are typically subject to discovery restrictions and other limitations that are designed to reduce time and expense. Such discovery, time-to-decision, and other limits are believed to be comparable to those types of restrictions envisioned with respect to protests by H.R. 1670.
- Both Boards will inherit staff and resources from GAO (1/4 of all GAO protest staff, assets, property, unexpended appropriations, authorizations, allocations and other funds going to the Civilian Board with the other 3/4 going to the Defense Board). Since the vast majority of GAO's cases are handled in writing -- GAO held only about 25 hearings in 1994 and about 30 in 1993 -- most cases will continue to be handled in the same manner, and by the same staff, as currently. The expectation is that GAO's procedures will be maintained for such cases.

^{2/} There appears to be a drafting error in bill section 424. Under subsection (a) the decision under review by the Board is the decision "by the head of the executive agency." As drafted, this raises the question of whether decisions made by other agency officials, such as the contracting officer, may be reviewed. In actuality, agency heads make very few if any procurement decisions. To avoid litigation over this point, we recommend that the language be revised to read any decision by "an official authorized to act for the agency."

^{3/} The ASBCA's statistics for the period FY 1989 through FY 1994, for example, show that appeals processed under that Board's Rule 12, which governs both accelerated and expedited small claims procedures, have comprised from 14.6% to 18.4% of the decided cases. The time from date of docketing to date of decision in such cases has typically been about 150 days. Non-Rule 12 cases at the ASBCA, by contrast, have taken nearly twice as long (based on median disposition time) to three times as long (based on average disposition time) to resolve.

- H.R. 1670 does require the Boards to provide ADR for protests -- if requested. ADR currently is not mandated for protests. The revised timeframe for protest consideration discussed below should facilitate ADR, although formal ADR may be too time consuming for some protests.

In contrast, some believe that consolidation of Contract Disputes Act (CDA) jurisdiction with Competition in Contract Act bid protest jurisdiction is inappropriate and combines processes that have two different objectives. Claims under the CDA involve adjudication of disputes between parties to a contract. The issues relate to contract administration and interpretation of the parties' contractual rights. A "de novo" review of the contracting agency's decision is seen as appropriate for such disputes.

However, bid protests are viewed as a mechanism for review of the process associated with selection of a contractor to meet the Government's needs. The protest forum does not adjudicate disputes; rather, it oversees the Government's procurement process to ensure that the public's interest in fair, cost-effective procurement of goods and services is served. The standard of review in protests appropriately focusses on whether or not the agency acted in accordance with law or regulation or was arbitrary or capricious.

2. Concerns Regarding Adequate Resources.

The issue of adequate resources to handle protest cases at the ASBCA, (H.R. 1670 gives protest cases priority), is of grave concern. Lack of resources would present a serious obstacle to implementation of the H.R. 1670 approach. Specifically, the ASBCA is facing a potentially significant backlog in contract disputes decisions.^{2/} During the past three years, 6 ASBCA judges have left and funds have not been made available for their replacement. An additional two judges will depart by October 1, 1995, with a third leaving by winter 1996.

(a) If protest jurisdiction is added to the ASBCA, resources must be made available to assure that all cases, appeals and protests, can be processed in a timely manner. If Congress is not prepared to commit funding for adequate judges, staff and other resources, the two-Board approach

^{2/} According to ASBCA statistics, while contract dispute cases have declined from 2,462 in 1990 to 1,977 cases pending on October 1, 1994, approximately 350 of the remaining cases involve amounts of \$1 million or more. These 350 appeals involve a total of approximately \$4 billion.

will not work. Also, just transferring GAO resources will not be sufficient due to the fact that at least 60% of the current hearings at GAO and 50% of hearings at the GSBGA come from DOD buying activities. This means that the ASBCA will have to hold approximately 30 more hearings per year and on a fast track. (Approximately 18 hearings from GAO cases and 12 from IT cases.) The Board probably would require that its existing and upcoming vacant judgeships be filled.

(b) Further, if the H.R. 1670 approach were to be adopted, provision should be made for transferring resources between the Defense Board and the Civilian Board as necessary to accommodate workload shifts. The authority would be similar to that currently provided in the Contract Disputes Act, 41 U.S.C. § 607, permitting transfer of resources among the Boards of Contract Appeals.

(c) The approach of H.R. 1670 in giving protests priority over claims may jeopardize timely processing of claims, however, separating contract disputes and protests into two separate divisions should assist in avoiding delays in the resolution of contract disputes or protests.

The Section also has one additional drafting concern about the current version of H.R. 1670. The bill provides a 45 day period for deciding protest cases which are processed on the paper record only. This is probably too short to permit adequate attention to these cases and will unduly burden the Boards. The Federal Acquisition Streamlining Act, which has only just become effective at GAO, actually extended the period for processing cases under the expedited procedures from 45 to 65 calendar days. This was because the accelerated procedures had received little use. Shortening the period, particularly when the large majority of cases will be processed on the record, is likely to be unworkable -- it is akin to telling GAO to process over 96 percent of its current decided cases under expedited procedures. A period of 85 calendar days for all cases may be more reasonable, as discussed below.

B. The Cohen Bill -- GAO As The Only Protest Forum

With respect to the Cohen Bill, these comments are limited to the bid protest issues only -- the Section is not providing comments on any other provision of the Cohen Bill at this time. The Cohen Bill transfers all administrative protest jurisdiction to the GAO under its current authority and makes no revisions to the GAO process.

The Procurement Law Group of GAO's Office of General Counsel has for many years provided informal, reasonably inexpensive bid

protest review of agency procurement decisions. Since 1991, GAO has advanced its process of reviewing agency records with the use of protective orders, which permit parties admitted under a protective order to review all information that is reviewed by GAO. GAO normally considers protest cases based on documents and written submissions, including affidavits. GAO will require the agency to produce all documents (whether or not contained in the agency's official record) relevant to the issues under consideration. Under GAO's current procedures, parties cannot require agencies to respond to written questions (e.g., questions regarding whether particular documents exist or have been destroyed). GAO also does not currently provide for deposition of witnesses prior to a hearing. In some cases (approximately 25-30 out of approximately 720 decided cases in 1993 and 1994) GAO will hold a hearing.

1. GAO's Process Is Sufficient - Nothing Else is Necessary.

Some take the position that, if there is only one forum, it should be GAO, and that use of GAO's current procedures should properly be extended to all protests. Those with this view note that GAO provides relatively informal and inexpensive review by an entity that was not involved in the initial decision, that has no stake in the outcome, and over which the procuring agency has no control. They also refer to the fact that nearly 3000 protesters each year opt to file protests with GAO rather than go to U.S. district court, indicating widespread confidence in GAO's system. They point out that when GAO determines agency action is improper, GAO will sustain a protest and put the agency on report.

2. GAO's Current Process is Not Sufficient For Track II Type Cases.

Many believe that if GAO were to be the only forum, additional statutory authority would have to be provided -- for cases that require additional evidence -- such as responses to interrogatories or compelled deposition/hearing testimony. Specifically, if the Cohen Bill's approach of centralizing all administrative protest jurisdiction in the GAO is adopted, the following additions to GAO's statutory authority are viewed by some as required to permit GAO to develop an adequate record for resolution of Track II type cases.

- Subpoena authority to compel government agencies and third parties to answer interrogatories where information that is material to the case does not exist in a current document.

- Subpoena authority to compel testimony from government and non-government personnel in depositions and hearings.
- Subpoena authority to compel the production of documents by non-government organizations or individuals.

Without such authority, GAO would continue to be dependent upon indirect devices such as the use of adverse inferences to secure testimony at GAO hearings. Further, without such authority, GAO is unable to compel information from parties who are not participating in the protest (for example, subcontractors and their employees, former government employees/military personnel, and former employees of participating offerors). With these additions to GAO's statutory authority GAO would be better equipped to handle Track II protests.

There is some concern over whether GAO's status as a legislative branch agency might interfere with GAO's ability to use such new authority in practice. This concern stems from the fact that historically the Department of Justice has from time to time, challenged GAO's authority on constitutional grounds.^{10/} Courts have examined constitutional challenges to GAO's protest authority. In Lear Siegler, Inc. v. Lehman, 842 F.2d 1102 (9th Cir. 1988), the Court rejected a constitutional challenge to GAO's authority to alter the length of the period that the CICA stay provision was in effect. The Court concluded that GAO's actions were a valid exercise of Congress' authority to investigate procurement decisions. Id. at 1109-111; see also Ameron, Inc. v. U.S. Army Corps of Engineers, 809 F.2d 979, 995 (3rd. Cir. 1986) ("CICA is an exercise of Congress' power to investigate and its power to publicize and criticize the President's execution of existing legislation.").

Thus, GAO should be able to exercise additional authority if it is provided. Some concern remains that DOJ would object to an enhanced GAO process. GAO's decision remains a recommendation.

3. Separate IT Procedures Under The Cohen Bill

There is concern by some over two provisions which the Cohen Bill adds for protests of IT procurements. First in what appears

^{10/} (See letter from John Mitchell, Attorney General of the U.S. to Elmer B. Staats, Comptroller General of the United States, June 14, 1971, cited in the Report of the Commission on Government Procurement, Vol. 4 at 41; see Weekly Compilation of Presidential Documents, Vol. 20--No. 29, July 23, 1984, where President Reagan challenged the CICA provisions.)

to be a drafting error, the Cohen Bill requires IT protests to be decided in 45 days - on a more expedited basis than other GAO cases. (Under FASA all GAO cases would be processed in 125 calendar days.) As discussed below, the protest period should be revised for all protests to 85 days.

Second, the Cohen Bill provides a "one protest per procurement" rule. In the view of some, this provision is unrealistic and illogical. It seems to presume that after one protest an agency will engage in no further improper conduct.

IV. Suspension and Time for Decision

A. Clarification of Time for Decision

Delays occasioned by the automatic suspension of contract performance pending resolution of a protest can be reduced for the vast majority of protests by reducing the present CICA deadline for the GAO decision from 125 calendar days, and requiring decision in all protests within 85 calendar days. While this deadline would be longer than the GSBICA's present 65 calendar days for ADP procurements, that deadline applies to far fewer cases (3,000 GAO cases each year v. 200 GSBICA protests). Moreover, the time for discovery in Track II will be no longer than the present GSBICA discovery period, so that the additional time could be used for the narrowing of issues through resolution of dispositive motions and prehearing conferences. The GSBICA now simply often does not have sufficient time before the hearing to narrow the issues. By providing somewhat more time for the decision to be issued, but no more time for discovery, the process overall should be less expensive because the hearings themselves could be focused on the issues genuinely in dispute.

B. Limit Suspension Override Authority to "Urgent and Compelling."

The H.R. 1670 proposes to allow an agency to override the automatic stay only based upon a finding that "urgent and compelling circumstances" preclude suspension of performance pending resolution of a protest. There is a difference of opinion whether this standard, which eliminates the best interests override, is the appropriate standard for the agency override determination. In its May testimony the Section took the position that either standard (urgent and compelling or best interest) could be used, depending upon the level of the official making the decision.

Upon reflection, however, some view the H.R. 1670 approach using only urgent and compelling test, as more appropriate because the issue is whether the delay in performance is acceptable. Since the only issue is delay, it seems appropriate that the standard for override also be a temporal one -- urgency.



The present alternative standard -- the best interests of the Government -- is viewed as too broad to prevent abuse. It has been found by some courts to allow so much discretion that agency decisions are immune from judicial review. See Topgallant Group, Inc. v. United States, 704 F. Supp. 265- (D.D.C. 1988) ("The court finds that the MSC's [Military Sealift Command] decision was based upon a discretionary determination of the best interests of the United States, and as such, is not reviewable by this court."). In any event, pursuant to the suggestion above that all protests be decided in 85 calendar days, the period for suspension would be much shorter than the current GAO suspension.

On the other hand, however, others believe that the agencies may need to avail themselves of the best interest override in order to relieve time pressure on a procurement which, while important, may not rise to the level of "urgent and compelling." For some procurements considerations other than time may bear on an agency's decision, such as instances where efficient use of the agency's resources may require the procurement to proceed notwithstanding a protest. For these other instances, the "urgent and compelling" test is viewed as too stringent.

V. Equal Treatment for Frivolous Litigation Positions.

In its May package, the Section recommended that the authority for awarding costs to successful protesters be discontinued and that authority for sanctions for frivolous protests be provided. Upon further consideration, a question has arisen whether, assuming adoption of the position that no party will be awarded costs based on the outcome of the protest, it is appropriate to impose cost penalties on only one party to the protest. Some have suggested that the protest forum(s) should be authorized to impose monetary sanctions on any party for taking a frivolous position that results in another party incurring unnecessary costs.

While there is not a belief in any quarter that filing frivolous protests is a widespread practice, or that the Government or intervenors often take frivolous positions, in the event monetary sanctions are considered a useful deterrent to frivolous litigation, some maintain that such sanctions should be available equally to all parties. Of course application of any sanctions would be in the discretion of the forum.



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